No. 83-850

In the Supreme Court of the United States

OCTOBER TERM, 1983

Supreme Court, U.S.
FILED
MAR 9 1984
ALEXANDER L. STEVAS
CLERK

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES CONNORS KARO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 22, 1983
CERTIORARI GRANTED JANUARY 16, 1984

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UNITED STATES DISTRICT COURT

No. 81-00021

UNITED STATES

v.

JAMES CONNORS KARO

21:846	Conspiracy (Ct. I)
21:841(a)(1)	Possession with Intent to Distribute Cocaine (Ct. II III)
18:2	Aiding and Abetting
21:846	Conspiracy (Ct. I)
21:841(a)(1)	Possession with Intent to Distribute Cocaine (Ct. II, III)
18:2	Aiding and Abetting

DOCKET ENTRIES

Date	Nr.	Proceedings
		MAGISTRATE PAPERS:
2/17/81		CONDS OF REL—PR with restr. KARO: 1108 Monroe, S. E. Albuquerque, NM 87108
2/9/81		AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT.
2/11/81	1	INDICTMENT.
2/12/81		WARRANT issued and delivered to USM.
2/17/81		ARRAIGNMENT set 2/19/81, at 11 before Mag.
2/17/81		WARRANT, return exec. 2/17/81.
2/19/81	2	ENTRY OF APPEARANCE by Mr. Boyd.

Date	Nr.	Proceedings
2/19/81		ARRAIGNMENT. Counsel present. Plea of NG. Trial set 3/30/81, at 9:30 a.m., before HCB. Ten days to file motions. Gallagher
2/26/81	10	MINUTE ORDER that Deft is granted extension of time to 3/12/81, to file motions; further that Govt respond to Defts' motions by 3/19/81; and motions hearing set for 3/23/81, at 9:30 a.m. (JC:krg) CTC
2/26/81	12	MOTION by Deft for Extension of Time to File Motions.
3/3/81		RECEIPT by Jackson J. Rupe, passport belonging to Deft.
3-5-81		Notice of jury trial of 3-30-81 mailed.
3/9/81	16	MOTION by Govt for issuance of subponea tecum in form as attached thereto.
3/12/81	19	ORDER that Clerk is directed to permit respective counsel, as well as Dr. Blackwell to UNM Institute of Applied Research Services to examine jury selection records. (JC) CTC EOD: 3/13/81
	20	JOINT SPECIAL MOTION by Deft to Suppress.
	21	MEMORANDUM in Support of Motion to Suppress.
	22	JOINT MOTION by Deft to Dismiss.
	23	MEMORANDUM in Support of Motion to Dismiss.
	24	JOINT MOTION by Deft to Disclose Confidential Informants and/or Undercover Govt Agents.
	25	MEMORANDUM BRIEF in Support of Motion to Disclose.

Date	Nr.	Proceedings
	26	JOINT MOTION by Deft for Disclosure, Inspection & Discovery.
	27	MEMORANDUM BRIEF in Support of Motion for Disclosure.
	28	JOINT MOTION by Deft for Bill of Particulars.
	29	MEMORANDUM BRIEF in Support of Motion for Bill of Particulars.
	30	JOINT MOTION by Deft for Govt Disclosure of Full Extent of Electronic Surveillance and Fourth Amendment Intrusions.
	31	MEMORANDUM BRIEF in Support of Motion for Govt Disclosure.
	32	JOINT MOTION by Deft to Suppress Evidence.
	33	MEMORANDUM in Support of Motion to Suppress.
	34	JOINT MOTION by Deft for Unsealing and Production of Further Court Documents Re Electronic Surveillance and Fourth Amendment Intrusions.
3/12/81	35	MOTION by Deft for Leave to File Additional Motions.
3/12/81	36	MOTION by Deft to Sever Counts and Defendants.
	37	MEMORANDUM BRIEF in Support of Motion to Sever.
3/19/81		MOTION hearing of 3/23/81 vacated by telephone.
3/19/81	49	RESPONSE by Govt to Defense Motions.
3/25/81	51	SUPERSEDING INDICTMENT.
3/26/81		SUMMONS issued for appearance 4/2/81, at 11 before Mag.

Date	Nr.	Proceedings
3/26/81		ARRAIGNMENT. Counsel present but Deft not present. Counsel enter plea of NOT GUILTY for Deft to Superseding Indictment. Present Conds of Rel to remain. New Motions to be filed by 4/10/81. HCB
		USM advised not to serve summons.
4-2-81		Hearing on pending motions 5-4-81, at 9:30 A.M. Notice to parties.
4-2-81		Jury trial Mon., June 1, 1981, 9:30 A.M. Notice mailed.
4/2/81	52	ORDER that Deft produce any U.S. passport he has by 4/24/81, to Clerk of this Court, which passport(s) shall be sealed by the Clerk and remain in custody of Clerk until further order of Court at trial, and that a subpoena duces tecum under Rule 17(c) FRCP be issued and served. (HCB)
		EOD: 4/2/81 CTC & Deft. One copy to Clerk.
4/9/81		Passport #H1527958 received 4/9/81 and lodged in safe in Clerk's Office. See Jesse Casaus for return of same upon Order of the Court.
4-9-81		Motion hearing changed to 5-11-81, 9:30 A.M. Notice sent.
5-11-81		9:30 A.M. Called for hearing on pending motions. Deft. present and by John W. Boyd and Nancy Hollander, retained counsel; Govt by Richard J. Smith and Larry Gomez. Evidence presented. 5:10 P.M. Recess to 9:00 A.M. tomorrow.
5-12-81		9:00 A.M. Second day of motion hearing. Appearances as on first day. Court makes ruling in open court. 3:00 P.M. Recess.
		Bratton, J. **Rptr: Meier**

Date	Nr.	Proceedings
5/22/81	65	ORDER that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of 9/10/80 is suppressed as evidence; and included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Alb, NM and the search of a house in Taos, NM. (HCB) EOD: 5/22/81, CTC.
6/19/81	69	MOTION by Govt to Reconsider and Set Aside Order.
6/29/81	70	JOINT RESPONSE by Defts to Pltf's Motion to Reconsider and Set Aside Order.
7/10/81	71	ORDER that the Motion by govt. to reconsider and set aside the Order of 5/22/81 granting deft. Motion to Suppress Evidence is denied. (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty.
7/10/81	72	MEMORANDUM OPINION (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty.
8/6/81	73	NOTICE OF APPEAL by Plaintiff of the Order of 7/10/81 and 5/22/81. Distribution on NOA as follows: To Deft: Copy of NOA. To USCA: Copy of NOA, docket entries & Desig. ltr. To Appellant: Copy of NOA, docket entries w/cert of desig attached; transcript order form, desig ltr setting conference for 8/13/81 at 10:00 a.m. USCA form ltr No. L-2 & L-2(a) (docketing statement instrs).

Date	Nr.	Proceedings
		To Appellee: Copy of NOA, copy of docket entires w/cert of desig attached, & design ltr setting confference. To Court Reporter: Copy of NOA, docket entries & desig ltr. To Judge: Copy of NOA. To USM: Copy of NOA.
8/10/81	74	ORDER correcting Order of 7/10/81 and adding name of deft. Gene R. Rhodes to caption of that Order. (HCB) EOD: 8/10/81 CTC, USA, USM, Deft., Prob.

UNITED STATES DISTRICT COURT

No. 81-00021

UNITED STATES

v.

RICHARD MILES HORTON

21:846	Conspiracy (Ct. I)
21:841(a)(1)	Possession with Intent to Distribute Cocaine (Ct. IV)
18:2	Aiding and Abetting
21:846	Conspiracy (Ct. I)
21:841(a)(1)	Possession with Intent to Distribute Cocaine (Ct. IV)
18:2	Aiding and Abetting

DOCKET ENTRIES

Date	Nr.	Proceedings
		MAGISTRATE PAPERS:
2/10/81		COMPLAINT
		CONDS. OF RELEASE—$15,000 c/s APPEARANCE BOND ($15,000 cashiers check)
		HORTON: 315 Wellesley Place, N.E. Albuquerque, NM 87106
		CASH ACKNOWLEDGMENT.
2/9/81		AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT.

Date	Nr.	Proceedings
2/13/81		ORDER that Deft be allowed to substitute $15,000 surety bond for $15,000 cash bond on deposit with Clerk. (Gallagher) Check issued payable to mother.
2/9/81		AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT.
2/19/81		APPEARANCE BOND. (Surety bond substituted for cash deposited in registry) Surety: Joe J. Baca (Baca Bonding Corp.) 1918 Broadway, N.E. Albuquerque, NM
2/11/81	1	INDICTMENT.
2/12/81		ARRAIGNMENT set 2/19/81, at 11 before Mag.
2/19/81		ARRAIGNMENT. Counsel present. Plea of NG. Trial set 3/30/81, at 9:30 a.m., before HCB. Ten days to file motions. Gallagher
2/19/81	4	ENTRY OF APPEARANCE by Mr. Marchiondo.
2/23/81	6	MOTION by Deft for Enlargement of Time to file motions.
	7	MEMORANDUM in Support of Motion for Enlargement of Time.
2/25/81	8	MINUTE ORDER that Deft is granted extension of time to 3/6/81, to file motions. (JC: krg) CTC
2/26/81	10	MINUTE ORDER that Deft is granted extension of time to 3/12/81, to file motions; further that Govt respond to Defts' motions by 3/19/81; and motions hearing set for 3/23/81, at 9:30 a.b. (JC:krg) CTC
3-5-81		Notice of jury trial of 3-30-81 mailed.

Date	Nr.	Proceedings
3/5/81	13	MOTION by Deft for Enlargement of Time re Trial.
	14	MOTION by Deft to adopt.
3/9/81	16	MOTION by Govt for issuance of subpoena duces tecum in form as attached thereto.
3/12/81	19	ORDER that Clerk is directed to permit respective counsel, as well as Dr. Blackwell of UNM Institute of Applied Research Services to examine jury selection records. (JC) CTC EOD: 3/13/81
	20	JOINT SPECIAL MOTION by Deft to Suppress.
	21	MEMORANDUM in Support of Motion to Suppress.
	22	JOINT MOTION by Deft to Dismiss.
	23	MEMORANDUM in Support of Motion to Dismiss.
	24	JOINT MOTION by Deft to Disclose Confidential Informants and/or Undercover Govt Agents.
	25	MEMORANDUM BRIEF in Support of Motion to Disclose.
	26	JOINT MOTION by Deft for Disclosure, Inspection & Discovery.
	27	MEMORANDUM BRIEF in Support of Motion for Disclosure.
	28	JOINT MOTION by Deft for Bill of Particulars.
	29	MEMORANDUM BRIEF in Support of Motion for Bill of Particulars.
	30	JOINT MOTION by Deft for Govt Disclosure of Full Extent of Electronic Surveillance and Fourth Amendment Intrusions.

Date	Nr.	Proceedings
	31	MEMORANDUM BRIEF in Support of Motion for Govt Disclosure.
	32	JOINT MOTION by Deft to Suppress Evidence.
	33	MEMORANDUM in Support of Motion to Suppress.
	34	JOINT MOTION by Deft for Unsealing and Production of Further Court Documents Re Electronic Surveillance and Fourth Amendment Intrusions.
3/12/81	35	MOTION by Deft for Leave to File Additional Motions.
3/12/81	38	MOTION by Deft to Suppress.
	39	MEMORANDUM in Support of Motion to Suppress.
3/12/81	46	MOTION by Deft for Severance from Deft Karo.
	47	MEMORANDUM in Support of Motion for Severance.
3-19-81		Motion hearing of 3-23-81 vacated by telephone.
3/19/81	49	RESPONSE by Govt to Defense Motions.
3/25/81	51	SUPERSEDING INDICTMENT.
3/26/81		SUMMONS issued for appearance 4/2/81, at 11 before Mag.
3/26/81		ARRAIGNMENT. Counsel present but Deft not present. Counsel enter plea of NOT GUILTY for Deft to Superseding Indictment. Present Conds of Rel to remain. New Motions to be filed by 4/10/81. HCB
		USM advised not to serve summons.
4-2-81		Hearing on pending motions, Mon., 5-4-81, 9:30 A.M. Notice to parties.

Date	Nr.	Proceedings
4-2-8		Jury trial Mon., 6-1-81, 9:30 A.M. Notice mailed.
4/2/81	52	ORDER that Deft produce any U.S. passport he has by 4/24/81, to Clerk of this Court, which passport(s) shall be sealed by the Clerk and remain in custody of Clerk until further order of Court at trial, and that a subpoena duces tecum under Rule 17(c) FRCP be issued and served. (HCB) EOD: 4/2/81 CTC & Deft. One copy to Clerk.
4-9-81		Motion hearing changed to 5-11-81. Notice mailed.
5/6/81	62	RESPONSE to Subpoena Duces Tecum by deft.
5-11-81		9:30 A.M. Called for hearing on pending motions. Deft. present and by William C. Marchiondo, retained counsel; Govt by Richard J. Smith and Larry Gomez. Evidence presented. 5:10 P.M. Recess to 9:00 A.M. tomorrow.
5-12-81		9:00 A.M. Second day of motion hearing. Appearances as on first day. Court makes ruling in open court. 3:00 P.M. Recess.
		Bratton, J. Rptr: Meier
5/22/81	65	ORDER that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of 9/10/80 is suppressed as evidence; and included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Albuq., NM and the search of a house in Taos, NM. (HCB) EOD: 5/22/81, CTC.

Date	Nr.	Proceedings
6/19/81	69	MOTION by Govt to Reconsider and Set Aside Order.
6/29/81	70	JOINT RESPONSE by Defts to Pltf's Motion to Reconsider and Set Aside Order.
7/10/81	71	ORDER that the Motion by govt. to reconsider and set aside the Order of 5/22/81 granting deft. Motion to Suppress Evidence is denied. (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty.
7/10/81	72	MEMORANDUM OPINION (HCB) EOD: 7/10/81 CC: U.S. Atty, CTC
8/6/81	73	NOTICE OF APPEAL by Plaintiff of the Order of 7/10/81 & 5/22/81. Distribution of NOA as follows: To Deft: Copy of NOA. To USCA: Copy of NOA, docket entries & desig ltr To Appellant: Copy of NOA, docket entries w/cert of desig attached; transcript order form, desig ltr setting conference for 8/13/81 at 10:00 a.m. USCA form ltr No. L-2 & L-2(a) (docketing statement instrs). To Appellee: Copy of NOA, copy of docket entries w/cert of desig attached, & desig ltr setting conference. To Court Reporter: Copy of NOA, docket entries & desig ltr. To Judge: Copy of NOA. To USM: Copy of NOA.
8/10/81	74	ORDER correcting Order of 7/10/81 and adding name of deft. Gene R. Rhodes to caption of that Order. (HCB) EOD: 8/10/81 CTC, USA, USM, Deft., Probation

UNITED STATES DISTRICT COURT

No. 81-00021

UNITED STATES

v.

WILLIAM ROBERTSON HARLEY

21:846	Conspiracy (Ct. I)
21:841(a)(1)	Possession with Intent to Distribute Cocaine (Ct. IV)
18:2	Aiding and Abetting
21:846	Conspiracy (Ct. I)
21:841(a)(1)	Possession with Intent to Distribute Cocaine (Ct. IV)
18:2	Aiding and Abetting

DOCKET ENTRIES

Date	Nr.	Proceedings
		MAGISTRATE PAPERS:
2/10/81		COMPLAINT CONDS. OF RELEASE ($15,000)
2/11/81		APPEARANCE BOND ($15,000 cashiers check) CASH ACKNOWLEDGMENT. (Copy to fiscal) HARLEY: 1301 Bryn Mawr, N.E. Albuquerque, NM 87106 Surety: William P. Harley, Jr. (Same address as deft)

Date	Nr.	Proceedings
2/9/81		AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT.
3/12/81		MOTION by Deft to Reduce Appearance Bond. (Copy to Mag.)
3/16/81		ORDER that Deft's Motion to Reduce Appearance Bond is DENIED. (Gallagher) Copies distributed by Magistrate's Office.
8/3/81		ASSIGNMENT OF BOND from Wm. P. Harley to Joseph (Sib) Abraham 8/3/81.
2/11/81	1	INDICTMENT.
2/12/81		ARRAIGNMENT set 2/19/81, at 11 before Mag.
2/19/81	3	ENTRY OF APPEARANCE by Mr. Abraham and Mr. Marchiondo.
2/19/81		ARRAIGNMENT. Counsel present. Plea of NG. Trial set 3/30/81, at 9:30 a.m., before HCB. Ten days to file motions. Gallagher
2/23/81	6	MOTION by Deft for Enlargement Time to file motions.
	7	MEMORANDUM in Support of Motion for Enlargement of Time.
2/25/81	8	MINUTE ORDER that Deft is granted extension of time to 3/6/81, to file motions. (JC: krg) CTC
2/26/81	10	MINUTE ORDER that Deft is granted extension of time to 3/12/81, to file motions; further that Govt respond to Defts' motions by 3/19/81; and motions hearing set for 3/23/81, at 9:30 a.m. (JC:krg) CTC
3-5-81		Notice of jury trial of 3-30-81 mailed.
3/9/81	16	MOTION by Govt for issuance of subpoena duces tecum in form as attached thereto.

Date	Nr.	Proceedings
3/12/81	19	ORDER that Clerk is directed to permit respective counsel, as well as Dr. Blackwell of UNM Institute of Applied Research Services to examine jury selection records. (JC) CTC EOD: 3/13/81
	20	JOINT SPECIAL MOTION by Deft to Suppress.
	21	MEMORANDUM in Support of Motion to Suppress.
	22	JOINT MOTION by Deft to Dismiss.
	23	MEMORANDUM in Support of Motion to Dismiss.
	24	JOINT MOTION by Deft to Disclose Confidential Informants and/or Undercover Govt Agents.
	25	MEMORANDUM BRIEF in Support of Motion to Disclose.
	26	JOINT MOTION by Deft for Disclosure, Inspection & Discovery.
	27	MEMORANDUM BRIEF in Support of Motion for Disclosure.
	28	JOINT MOTION by Deft for Bill of Particulars.
	29	MEMORANDUM BRIEF in Support of Motion for Bill of Particulars.
	30	JOINT MOTION by Deft for Govt Disclosure of Full Extent of Electronic Surveillance and Fourth Amendment Intrusions.
	31	MEMORANDUM BRIEF in Support of Motion for Govt Disclosure.
	32	JOINT MOTION by Deft to Suppress Evidence.
	33	MEMORANDUM in Support of Motion to Suppress.

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	34	JOINT MOTION by Deft for Unsealing and Production of Further Court Documents Re Electronic Surveillance and Fourth Amendment Intrusions.
3/12/81	35	MOTION by Deft for Leave to Fle Additional Motions.
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	47	MEMORANDUM in Support of Motion for Severance.
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3/19/81	49	RESPONSE by Govt to Defense Motions.
3/25/81	51	SUPERSEDING INDICTMENT.
3/26/81		SUMMONS issued for appearance 4/21/81, at 11 before Mag.
3/26/81		ARRAIGNMENT. Counsel present but Deft not present. Counsel enter plea of NOT GUILTY for Deft to Superseding Indictment. Present Conds of Rel to remain. New Motions to be filed by 4/10/81. HCB USM advised not to serve summons.
4/2/81		Hearing on pending motions Mon., 5-4-81, 9:30 A.M. Notice to parties.
4/2/81		Jury trial Mon., 6-1-81, 9:30 A.M. Notice mailed.
4/2/81	52	ORDER that Deft produce any U.S. passport he has by 4/24/81, to Clerk of this Court, which passport(s) shall be sealed by the Clerk and remain in custody of Clerk until

Date	Nr.	Proceedings
		further order of Court at trial, and that a subpoena duces tecum under Rule 17(c) FRCP be issued and served. (HCB) EOD: 4/2/81 CTC & Deft. One copy to Clerk.
4/9/81		Motion hearing changed to 5-11-81. Notice mailed.
5/11/81		9:30 A.M. Called for hearing on pending motions. Deft. present and by Joseph "Sib" Abraham, Jr., and Wm. C. Marchiondo, retained counsel; Govt by Richard J. Smith and Larry Gomez. Evidence presented. 5:10 P.M. Recess to 9:00 A.M. tomorrow.
5/12/81		9:00 A.M. Second day of motion hearing. Appearances as on first day. Court makes ruling in open court. 3:00 P.M. Recess.
		Bratton, J. Rptr: Meier
5/22/81	65	ORDER that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of 9/10/80 is suppressed as evidence; and included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Alb., NM and the search of a house in Taos, NM. (HCB) EOD: 5/22/81, CTC.
6/19/81	69	MOTION by Govt to Reconsider and Set Aside Order.
6/29/81	70	JOINT RESPONSE by Defts to Pltf's Motion to Reconsider and Set Aside Order.
7/10/81	71	ORDER that the Motion by govt. to reconsider and set aside the Order of 5/22/81 granting deft. Motion to Suppress Evidence is denied. (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty.

Date	Nr.	Proceedings
7/10/81	72	MEMORANDUM OPINION (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty.
8/6/81	73	NOTICE OF APPEAL by Plaintiff of the Order of 7/10/81 and 5/22/81.
		Distribution on NOA as follows:
		To Deft: Copy of NOA.
		To USCA: Copy of NOA, docket entries w/ cert. of desig attached; transcript order form, desig ltr setting conference for 8/13/81 at 10:00 a.m. USCA form ltr. L-2 L-2(a) (docketing statement instrs).
		To Appellee: Copy of NOA, copy of docket entries w/cert of desig attached, & desig ltr setting conference.
		To Court Reporter: Copy of NOA, docket entries & desig ltr.
		To Judge: Copy of NOA.
		To USM: Copy of NOA.
8/10/81	74	ORDER correcting Order of 7/10/81 and adding name of deft. Gene R. Rhodes to caption of that Order. (HCB) EOD: 8/10/81 CTC, USA, USM, Deft., Probation

UNITED STATES DISTRICT COURT

No. 81-00021

UNITED STATES

v.

MICHAEL GAYLORD STEELE

21:846	Conspiracy (Ct. I)
21:841(a)(1)	Possession with Intent to Distribute Cocaine (Ct. IV)
18:2	Aiding and Abetting
21:846	Conspiracy (Ct. I)
21:841(a)(1)	Possession with Intent to Distribute Cocaine (Ct. IV)
18:2	Aiding and Abetting

DOCKET ENTRIES

Date	Nr.	Proceedings
		MAGISTRATE PAPERS:
2/10/81		COMPLAINT CONDS. OF RELEASE ($15,000 c/s)
2/11/81		APPEARANCE BOND ($15,000 surety [Sandoval, Sandoval & Trimble Bonding Co., 401 5th, N.W., Albuquerque] STEELE: 907 McDuffie Cr., N.E. Albuquerque, NM 87110
2/9/81		AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT.
2/11/81	1	INDICTMENT.

Date	Nr.	Proceedings
2/12/81		ARRAIGNMENT. Counsel present. Plea of NG. Trial set 3/30/81, at 9:30 a.m., before HCB. Ten days to file motions. Gallagher
2/19/81	5	ENTRY OF APPEARANCE by Mr. Beam.
2/26/81	9	REQUEST by Deft for Extension of Time to File Motions.
2/26/81	10	MINUTE ORDER that Deft is granted extension of time to 3/12/81, to file motions; further that Govt respond to Defts' motions by 3/19/81; and motions hearing set for 3/23/81, at 9:30 a.m. (JC:krg) CTC
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3/9/81	16	MOTION by Govt for issuance of subpoena duces tecum in form as attached thereto.
3/10/81	17	MOTION by Deft to Adopt.
	18	MOTION by Deft for Enlargement of Time re trial.
3/12/81	19	ORDER that Clerk is directed to permit respective counsel, as well as Dr. Blackwell of UNM Institute of Applied Research Services to examine jury selection records. (JC) CTC EOD: 3/13/81
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	21	MEMORANDUM in Support of Motion to Suppress.
	22	JOINT MOTION by Deft to Dismiss.
	23	MEMORANDUM in Support of Motion to Dismiss.
	24	JOINT MOTION by Deft to Disclose Confidential Informants and/or Undercover Govt Agents.

Date	Nr.	Proceedings
	25	MEMORANDUM BRIEF in Support of Motion to Disclose.
	26	JOINT MOTION by Deft for Disclosure, Inspection & Discovery.
	27	MEMORANDUM BRIEF in Support of Motion for Disclosure.
	28	JOINT MOTION by Deft for Bill of Particulars.
	29	MEMORANDUM BRIEF in Support of Motion for Bill of Particulars.
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	33	MEMORANDUM in Support of Motion to Suppress.
	34	JOINT MOTION by Deft for Unsealing and Production of Further Court Documents Re Electronic Surveillance and Fourth Amendment Intrusions.
3/12/81	35	MOTION by Deft for Leave to File Additional Motions.
3/12/81	42	MOTION by Deft to Suppress Statements and/or Admissions.
	43	MOTION by Deft for Severance of Defts and Cts.
3/12/81	46	MOTION by Deft for Severance from Deft Karo.
	47	MEMORANDUM in Support of Motion for Severance.

Date	Nr.	Proceedings
3/17/81	48	RESPONSE by Deft In Opposition to Govt's Motion for Issuance of Subpoena Duces Tecum.
3/19/81		Motion hearing of 3-23-81 vacated by telephone.
3/19/81	49	RESPONSE by Govt to Defense Motions.
3/25/81	51	SUPERSEDING INDICTMENT.
3/26/81		SUMMONS issued for appearance 4/2/81, at 11 before Mag.
3/26/81		ARRAIGNMENT. Counsel present but Deft not present. Counsel enter plea of NOT GUILTY for Deft to Superseding Indictment. Present Conds of Rel to remain. New Motions to be filed by 4/10/81. HCB
		USM advised not to serve summons.
4/2/81		Hearing on pending motions Mon., 5-4-81, 9:30 A.M. Notice to parties.
4/2/81		Jury trial Mon., 6-1-81, 9:30 A.M., Notice mailed.
4/2/81		11:07 A.M. Called for hearing on Govt. motion for issuance of subpoena duces tecum directing delivery of passports to Court. Retained Counsel Jim Beam appears for deft; Govt by AUSA Richard Smith. Defense counsel agrees to submit matter on memoranda on file. Court will order issuance of subpoena and that passports be tendered to the Clerk of the Court and sealed until the further order of the Court. Order to be entered. 11:25 A.M. Recess.
		Bratton, J. Rptr: Meier (Baarstad)
4/21/81	52	ORDER that Deft produce any U.S. passport he has by 4/24/81, to Clerk of this Court, which passport(s) shall be sealed by the

Date	Nr.	Proceedings
		Clerk and remain in custody of Clerk until further order of Court at trial, and that a subopena duces tecum under Rule 17(c) FRCP be issued and served. (HCB) EOD: 4/2/81 CTC & Deft. One copy to Clerk.
4/9/81		Motion hearing changed to 5-11-81. Notice mailed.
4/10/81	57	MOTION by Deft for Specific Disclosure of Exculpatory Info.
4/24/81	60	RESPONSE by Deft to Subpoena Duces Tecum.
5/11/81		9:30 A.M. Called for hearing on pending motions. Deft. present and by Jim Beam, retained counsel; Govt by Richard J. Smith and Larry Gomez. Evidence presented. 5:10 P.M. Recess to 9:00 A.M. tomorrow.
5/13/81		9:00 A.M. Second day of motion hearing. Appearances as on first day. Court makes ruling in open court. 3:00 P.M. Recess.
		Bratton, J. Rptr: Meier
5/22/81	65	ORDER that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of 9/10/80 is suppressed as evidence; and included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Alb., NM and the search of a house in Taos, NM. (HCB) EOD: 5/22/81, CTC.
6/19/81	69	MOTION by Govt to Reconsider and Set Aside Order.
6/29/81	70	JOINT RESPONSE by Defts to Pltf's Motion to Reconsider and Set Aside Order.

Date	Nr.	Proceedings
7/10/81	71	ORDER that the Motion by govt. to reconsider and set aside the Order of 5/22/81 granting deft. Motion to Suppress Evidence is denied. (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty.
7/10/81	72	MEMORANDUM OPINION (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty.
8/6/81	73	NOTICE OF APPEAL by Plaintiff of the Order of 7/10/81, and 5/22/81. Distribution of NOA as follows: To Deft: Copy of NOA. To USCA: Copy of NOA, docket entries & desig. ltr. To Appellant: Copy of NOA, docket entries w/cert. of desig attached; transcript order form, desig ltr setting conference for 8/13/81 at 10:00 a.m. USCA form ltr. No. L-2 & L-2(a) (docketing statement instrs). To Appellee: Copy of NOA, copy of docket entries w/cert of desig attached, & desig ltr setting conference. To Court Reporter: Copy of NOA, docket entries & desig ltr. To Judge: Copy of NOA. To USM: Copy of NOA.
8/10/81	74	ORDER correcting Order of 7/10/81 and adding name of deft. Gene R. Rhodes to caption of that Order. (HCB) EOD: 8/10/81 CTC, USA, USM, Deft., Probation

UNITED STATES DISTRICT COURT

No. 81-00021

UNITED STATES

v.

EVAN ROTH

21:846	Conspiracy (Ct. I)
21:841(a)(1)	Possession with Intent to Distribute Cocaine (Ct. IV)
18:2	Aiding and Abetting
21:846	Conspiracy (Ct. I)
21:841(a)(1)	Possession with Intent to Distribute Cocaine (Ct. IV)
18:2	Aiding and Abetting

DOCKET ENTRIES

Date	Nr.	Proceedings
		MAGISTRATE PAPERS:
2/10/81		COMPLAINT CONDS. OF RELEASE ($15,000 c/s)
2/11/81		Motion for Modification of Condition of Release filed by defendant.
		Unopposed by USA
		FIRST AMENDED CONDS. OF RELEASE entered (DRG)—$15,000/10% deposit
2/12/81		APPEARANCE BOND. (Receipt attached for $1,500)
		ROTH: 4745 Gibson, S.E., Apt. C Albuquerque, NM 87108

Date	Nr.	Proceedings
2/9/81		AFFIDAVIT FOR SEARCH WARRANT & SEARCH WARRANT.
2/17/81		ORDER Appointing FPD. (McCoy)
6/3/81		CJA 21 authorizing payment to Cary J. Morrow, Chemist.
2/11/81	1	INDICTMENT.
2/12/81		ARRAIGNMENT set 2/19/81, at 11 before Mag.
2/19/81		ARRAIGNMENT. Counsel present. Plea of NG. Trial set 3/30/81, at 9:30 a.m., before HCB. Ten days to file motions. Gallagher
2/26/81	10	MINUTE ORDER that Deft is granted extension of time to 3/12/81, to file motions; further that Govt respond to Defts' motions by 3/19/81; and motions hearing set for 3/23/81, at 9:30 a.m. (JC:krg) CTC
2/26/81	11	MOTION by Deft for Extension of Time to File Motions.
3/5/81		Notice of jury trial of 3-30-81 mailed.
3/6/81	15	MOTION by Deft for Order to permit defense counsel as well as Dr. Blackwell examine questionnaires and other jury selection records.
3/9/81	16	MOTION by Govt for issuance of subpoena duces tecum in form as attached thereto.
3/12/81	19	ORDER that Clerk is directed to permit respective counsel, as well as Dr. Blackwell of UNM Institute of Applied Research Services to examine jury selection records. (JC) CTC EOD: 3/13/81
	20	JOINT SPECIAL MOTION by Deft to Suppress.

Date	Nr.	Proceedings
	21	MEMORANDUM in Support of Motion to Supp ess.
	22	JOINT MOTION by Deft to Dismiss.
	23	MEMORANDUM in Support of Motion to Dismiss.
	24	JOINT MOTION by Deft to Disclose Confidential Informants and/or Undercover Govt Agents.
	25	MEMORANDUM BRIEF in Support of Motion to Disclose.
	26	JOINT MOTION by Deft for Disclosure, Inspection & Discovery.
	27	MEMORANDUM BRIEF in Support of Motion for Disclosure.
	28	JOINT MOTION by Deft for Bill of Particulars.
	29	MEMORANDUM BRIEF in Support of Motion for Bill of Particulars.
	30	JOINT MOTION by Deft for Govt Disclosure of Full Extent of Electronic Surveillance and Fourth Amendment Intrusions.
	31	MEMORANDUM BRIEF in Support of Motion for Govt Disclosure.
	32	JOINT MOTION by Deft to Suppress Evidence.
	33	MEMORANDUM in Support of Motion to Suppress.
	34	JOINT MOTION by Deft for Unsealing and Production of Further Court Documents Re Electronic Surveillance and Fourth Amendment Intrusions.
3/12/81	35	MOTION by Deft for Leave to File Additional Motions.

Date	Nr.	Proceedings
3/12/81	44	MOTION by Deft for Severance.
	45	MEMORANDUM in Support of Motion for Severance.
3/12/81	46	MOTION by Deft for Severance from Deft Karo.
	47	MEMORANDUM in Support of Motion for Severance.
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3/19/81	49	RESPONSE by Govt to Defense Motions.
3/23/81	50	RESPONSE by Deft in Opposition to Issuance of Subpoena Duces Tecum.
3/25/81	51	SUPERSEDING INDICTMENT.
3/26/81		SUMMONS issued for appearance 4/2/81, at 11 before Mag.
3/26/81		ARRAIGNMENT. Counsel present but Deft not present. Counsel enter plea of NOT GUILTY for Deft to Superseding Indictment. Present Conds of Rel to remain. New Motions to be filed by 4/10/81. HCB
		USM advised not to serve summons.
4/2/81		Hearing on pending motions, Mon., 5-4-81, 9:30 A.M. Notice mailed.
4/2/81		Jury trial Mon., 6-1-81, 9:30 A.M. Notice mailed.
4/2/81		11:07 A.M. Called for hearing on Govt. motion for issuance of subpoena duces tecum directing delivery of passports to Court. Ray Twohig for deft Roth had previously stated that Court could rule on the matter on memoranda submitted on issue. Counsel for co-deft Steele present at hearing; Govt by AUSA Richard Smith. Court will order issuance of subpoena and that passports be tendered to the Clerk of the Court and sealed

Date	Nr.	Proceedings
		until the further order of the Court. Order to be entered. 11:24 A.M. Recess.
		Bratton, J. Rptr: Meier (Baarstad)
4/2/81	52	ORDER that Deft produce any U.S. passport he has by 4/24/81, to Clerk of this Court, which passport(s) shall be sealed by the Clerk and remain in custody of Clerk until further order of Court at trial, and that a subpoena duces tecum under Rule 17(c) FRCP be issued and served. (HCB) EOD: 4/2/81 CTC & Deft. One copy to Clerk.
4/9/81		Motion hearing changed to 5-11-81. Notice mailed.
4/8/81	53	ORDER for Free Process. (HCB) EOD: 4/9/81 One CC to USM. *SEALED*
	54	ORDER Sealing Order for Free Process. (HCB) EOD: 4/9/81 CTC
4/24/81	61	RESPONSE by Deft to Subpoena Duces Tecum.
5/8/81	63	ORDER FOR FREE PROCESS. (HCB) EOD: 5/8/81 One CC to USM. *SEALED*
	64	ORDER Sealing Order for Free Process. (HCB) EOD: 5/8/81. CTC.
5/11/81		9:30 AM Called for hearing on pending motions. Deft. present and by Raymond Twohig, FPD; Govt by Richard J. Smith and Larry Gomez. Evidence presented. 5:10 PM Recess to 9:00 A.M. tomorrow.
5/12/81		9:00 A.M. Second day of motion hearing. Appearances as on first day. Court makes ruling in open court. 3:00 P.M. Recess.
		Bratton, J. Rptr: Meier

Date	Nr.	Proceedings
5/22/81	65	ORDER that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of 9/10/80 is suppressed as evidence; and included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Alb., NM and the search of a house in Taos, NM. (HCB) EOD: 5/22/81, CTC.
6/19/81	69	MOTION by Govt to Reconsider and Set Aside Order.
6/29/81	70	JOINT RESPONSE by Defts to Pltf's Motion to Reconsider and Set Aside Order.
7/10/81	71	ORDER that the Motion by govt. to reconsider and set aside the Order of 5/22/81 granting deft. Motion to Suppress Evidence is denied. (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty.
7/10/81	72	MEMORANDUM OPINION (HCB) EOD: 7/10/81 CC: CTC, U.S. Atty.
8/6/81	73	NOTICE OF APPEAL by Plaintiff of the Order of 7/10/81, and 5/22/81.
		Distribution of NOA as follows:
		To Deft: Copy of NOA.
		To USCA: Copy of NOA, docket entries & desig ltr.
		To Appellant: Copy of NOA, docket entries w/cert. of desig attached; transcript order form, desig ltr setting conference for 8/13/81 at 10:00 a.m. USCA form ltr. 8/13/81 at 10:00 a.m. USCA form ltr. L-1 & L-2(a) (docketing statement instrs).
		To Appellee: Copy of NOA, copy of docket entries w/cert of desig attached, & desig ltr setting conference.

Date	Nr.	Proceedings
		To Court Reporter: Copy of NOA, docket entries & desig. ltr. To Judge: Copy of NOA. To USM: Copy of NOA.
8/10/81	74	ORDER correcting Order of 7/10/81 and adding name of deft. Gene R. Rhodes to caption of that Order. (HCB) EOD: 8/10/81 CTC, USA, USM, Deft., Probation

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

Criminal No. 81-21

21 U.S.C. 846 Conspiracy; 21 U.S.C. 841(a)(1)
Possession With Intent to Distribute Cocaine;
18 U.S.C. 2 Aiding and Abetting

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES CONNORS KARO, RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, GENE R. RHODES, MICHAEL GAYLORD STEELE and EVAN ROTH, DEFENDANTS

SUPERCEDING INDICTMENT

The Grand Jury charges:

COUNT I

That commencing on or about the 1st day of December, 1978, and continuing thereafter through on or about the 10th day of February, 1981, in the State and District of New Mexico, the Defendants JAMES CONNORS KARO, RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, GENE R. RHODES, MICHAEL GAYLORD STEELE and EVAN ROTH, unlawfully, wilfully, knowingly, and intentionally did agree, combine, conspire and confederate together with one another and with one or more other persons not named herein as defendants, for the purpose of committing offenses against the United States, to wit: possession with intent to distribute Cocaine, a Schedule II narcotic drug controlled substance, contrary to and in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

In furtherance of their said conspiracy and to effect its object they performed, among others, the following overt acts:

1. On or about the 1st day of January, 1979, in the State and District of New Mexico, the Defendant GENE R. RHODES travelled by auto from Albuquerque, New Mexico to a location near Taos, New Mexico, for the purpose of extracting and purifying Cocaine, a Schedule II narcotic drug controlled substance.

2. On or about the 20th day of September, 1980, in the State and District of New Mexico, the Defendants JAMES CONNORS KARO and RICHARD MILES HORTON obtained and possessed a quantity of anhydrous ether for the purpose of extracting and purifying Cocaine, a Schedule II narcotic drug controlled substance.

3. On or about the 10th day of February, 1981, in the State and District of New Mexico, the Defendants RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, MICHAEL GAYLORD STEELE and EVAN ROTH, did possess a quantity of Cocaine, a Schedule II narcotic drug controlled substance, and a quantity of Cocaine, a Schedule II narcotic drug controlled substance, in an anhydrous ether solution.

In violation of 21 U.S.C. 846.

COUNT II

On or about the 30th day of September, 1980, in the State and District of New Mexico, the Defendant JAMES CONNORS KARO, unlawfully, knowingly, and intentionally did possess with intent to distribute a quantity of Cocaine, a Schedule II narcotic drug controlled substance.

In violation of 21 U.S.C. 841(a)(1).

COUNT III

On or about the 30th day of September, 1980, in the State and District of New Mexico, the Defendant

JAMES CONNORS KARO, unlawfully, knowingly, and inntentionally did distribute a quantity of Cocaine, a Schedule II narcotic drug controlled substance.

In violation of 21 U.S.C. 841(a)(1).

COUNT IV

On or about the 10th day of February, 1981, in the State and District of New Mexico, the Defendants RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, MICHAEL GAYLORD STEELE and EVAN ROTH, unlawfully, knowingly and intentionally did possess with intent to distribute a quantity of Cocaine, a Schedule II narcotic drug controlled substance.

In violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

A TRUE BILL:

Foreman of the Grand Jury

/s/ R. E. Thompson
R. E. THOMPSON
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 81-21 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES CONNORS KARO, ET AL., DEFENDANTS

[Filed Mar. 12, 1981]

JOINT MOTION TO SUPPRESS EVIDENCE

The Defendants, through their undersigned attorneys, respectfully move the Court to suppress all evidence, tangible or intangible, seized and information gained, directly or indirectly, as a result of unlawful electronic surveillance and Fourth Amendment intrusions.

As grounds, the Defendants state:

1. On September 10, 1980, United States District Judge Edwin L. Mechem, acting pursuant to a request for authorization by the United States ("Exhibit A"), signed an Order ("Exhibit "C") authorizing the installation of an electronic tracking device (beeper) in a five-gallon can of anhydrous ether that had been ordered by Carl Muehlenweg.

2. A beeper was installed in a five-gallon container of ether owned by agents of the Drug Enforcement Administration (DEA) and this container was switched with a similar container ordered by Carl Muehlenweg and allegedly owned by Defendant Karo.

3. According to an affidavit accompanying an application upon which the Order mentioned above was extended for ninety days (Exhibit E), the ether containing the beeper was later located at 1108 Monroe, SE, Albuquerque, New Mexico, the residence of Defendant Karo

and was subsequently located at 1808 Rita, NE, Albuquerque, New Mexico, and 315 Wellsley Place, NE, Albuquerque, New Mexico, private residences of the other Defendants.

4. Tangible and intangible evidence against the Defendants was procurred as a result of the implantation and use of the electronic beeper by agents of the DEA.

5. The use of the beeper inside the Defendants' cars, houses and other property, constituted searches and seizures within the meaning of the Fourth Amendment to the United States Constitution.

6. The Orders authorizing the installation of the beeper were not valid in that there is no statute or court rule authorizing this procedure.

7. If the Orders were intended to be search warrants issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure, they were invalid because they did not comply with the requirements of that rule, including, but not limited to the following:

a. The affidavit supporting the Orders failed to establish probable cause to believe the property to be seized was in the place to be searched;

b. The Orders did not contain requirements that they be served between the hours of 6:00 a.m. and 10:00 p.m., or show reasonable cause to authorize their execution at night;

c. The Orders were not served at the time of the seizure, nor were copies or receipts left at the places where the Orders were executed;

d. There were no returns made nor were written inventories filed;

e. The warrants did not require that they be served within ten days, nor were they served within ten days; and,

f. The Orders were not for the purpose of searching for and seizing designated property;

8. If the Orders were intended to be issued pursuant to 18 U.S.C. 2510-2520, the wiretapping statute, they

were invalid because they did not comply with the requirements of that statute, including, but not limited to the following:

a. The statute only authorizes orders to be issued for eavesdropping or interception of a wire or oral communication, not for an electronic tracking device;

b. The affidavits failed to show facts necessary to establish probable cause that seizable evidence would be obtained by the use of the electronic tracking device;

c. The affidavits failed to comply with the requirements of 18 U.S.C. § 2518(1), which sets out the contents and form of the application for the order, in that they contain no statements of the period of time for the application;

d. The Orders failed to contain statements as to whether the interruption automatically terminated when desired communications had been obtained, as required by 18 U.S.C. § 2518(4)(e);

e. The Orders failed to contain the identity of the person whose communications were to be intercepted, as required by 18 U.S.C. § 2518(4); and,

f. The Orders failed to contain any constitutionally adequate provision for a return to the Court.

9. The issuance of the Orders were not based upon probable cause.

10. The issuance of the Orders granting extension of the authorized use of the beeper were not based upon probable cause.

11. The DEA agents violated the express terms of Judge Mechem's original Order which forbade any trespass on real property when they continued to monitor the beeper after it was located in the private residences of the Defendants.

12. The original Order was limited to thirty days and was subsequently extended to ninety days. The affidavits in support of the Orders and the extensions contain material misrepresentations of fact that were knowingly made. Specifically, *inter alia*, the application stated that

Carl Muehlenweg was an offender when in fact he was acting as a DEA agent (said misstatements are detailed in a special motion to suppress filed contemporaneously with this motion).

13. The installation of the beeper was not in compliance with Judge Mechem's original Order in that the DEA agents installed the beeper in a cannister belonging to the federal government and then transferred the ether from the cannister ordered by Muehlenberg. Judge Mechem's Order authorized the installation of a beeper in a cannister ordered by Muehlenweg.

14. Agents continued surveillance from January 7 to 13, 1981, during which time there was no order authorizing any surveillance whatsoever.

15. The second application for extension of authorization for the beeper was invalid because the Order had expired prior to its renewal (*see* Exhibit "D").

16. Subsequent to gaining authorization for a beeper and utilizing same, the DEA agents secured a Court Order from Judge Mechem (Exhibit N) to enter Locker # 143, U-Stor-It Company, 407 Cutler, Albuquerque, New Mexico, and install a tone alarm which they accomplished on October 9, 1980.

17. The application (Exhibit L) and supporting affidavit (Exhibit M), utilized to secure this Order and the resulting Order were insufficient and invalid for the following reasons:

a. The affidavit did not set forth a factual situation which rises to the level of probable cause to believe that a crime was being committed.

b. The affidavit did not set forth a factual situation which would demonstrate or even allege that ordinary forms of surveillance would not suffice.

c. The affidavit and application did not sufficiently connect the five-gallon drum of ether with a specific offense.

d. The application and affidavit do not conform to the requirements of 18 U.S.C. 2511, *et seq.*, which is the

only statutory scheme allowing entry to implant electronic surveillance devices.

e. This search was the fruit of the prior unlawful electronic surveillance (beeper).

f. The request and resulting Order do not satisfy the requirements of the Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure.

g. The request and resulting Order do not conform with the requirements of 18 U.S.C. 2811, *et seq.*

18. The Order to enter and to install the electronic equipment is invalid because:

a. The absence of a time limit for such installation voids such an order;

b. There is no precedent in common law for the utilization of a search warrant for this purpose; and,

c. There is no statutory scheme which would permit such entry upon the justification and authorization offered.

19. An order so framed is in violation of the guarantees of the Fourth Amendment to the United States Constitution.

20. The affidavit contained material misrepresentations of fact that were knowingly made. Specifically, the affidavit refers to an attachment, Exhibit A, but there is no Exhibit A attached to the affidavit in the Court file. (*See* Special Motion to Suppress filed on this date).

21. Subsequent to gaining authorization for a beeper and the entry into the storage locker, the agents of the DEA sought a search warrant for "a two-story contemporary wood frame house . . . located about 2.7 miles northwest on New Mexico Route 240, from the intersection of Routes 240 and 68 at Taos, New Mexico."

22. The application and supporting affidavit, as well as the resulting Order (Exhibits J & K), were invalid for the following reasons:

a. This search was the fruit of the prior unlawful electronic surveillance (beeper); and also the fruit of the prior unlawful entry into storage locker # 143;

b. The affidavit did not set forth a factual situation which rises to the level of probable cause to believe that a crime was being committed; and

c. The affidavit supporting such search warrant contains several misstatements of fact which were intentionally or recklessly made by the government agent making the affidavit (said misstatements are detailed in the Special Motion to Suppress filed on this date).

WHEREFORE, the Defendants respectfully request that this Court suppress all tangible items, sensory information, testimony and other fruits of the unlawful electronic surveillance and Fourth Amendment intrusions described above.

Respectfully submitted,

FREEDMAN, BOYD & DANIELS, P.A.

By /s/ Nancy Hollander
NANCY HOLLANDER
40 First Plaza, 7th Floor
Albuquerque, New Mexico 87102
(505) 842-9960
Attorneys for Defendant Karo

/s/ [Illegible]
JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS
505 Caples Building
El Paso, Texas 79901
Attorneys for Defendant William Robertson Harley

/s/ R. Raymond Twohig
RAYMOND TWOHIG
Assistant Public Defender
United States Courthouse
Albuquerque, New Mexico 87102
Attorney for Defendant Evan Roth

/s/ William C. Marchiondo
WILLIAM C. MARCHIONDO
P.O. Box 568
Albuquerque, New Mexico 87102
Attorney for Defendant Richard
Miles Horton

/s/ J. R. Beam
715 Tijeras, NW
Albuquerque, New Mexico 87103
Attorney for Defendant Michael
Gaylord Steele.

I hereby certify that the foregoing
Motion was hand-delivered to the
U.S. Attorney's Office this 12th
day of March, 1981.

/s/ [Illegible]

EXHIBIT A

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. N9478

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INSTALLATION OF AN ELECTRONIC TRACKING BEACON ("BEEPER") IN ONE FIVE-GALLON CAN CONTAINING ANHYDROUS ETHER

[Filed Sep. 10, 1980]

APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE USE OF AN ELECTRONIC "BEEPER" AS A SURVEILLANCE AID

James F. Blackmer, Assistant United States Attorney, having reviewed the attached Affidavit of Special Agent Richard Rottinger, hereby respectfully requests an Order authorizing the use of an electronic tracking beacon ("beeper") in one five-gallon can containing Anhydrous Ether for thirty (30) days (or October 15, 1980, whichever shall first occur) in the investigation of offenses committed by Carl Muehlenweg and others in violation of 21 USC 841(a)(1) and 846, manufacturing a controlled substance and conspiracy to manufacture a controlled substance.

This application is based on the sworn Affidavit of Special Agent Richard Rottinger, Drug Enforcement Administration, Department of Justice.

R. E. THOMPSON
United States Attorney

/s/ James F. Blackmer
JAMES F. BLACKMER
Assistant U.S. Attorney

EXHIBIT B

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. ———

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INSTALLATION OF AN ELECTRONIC TRACKING BEACON ("BEEPER") IN ONE FIVE-GALLON CAN CONTAINING ANHYDROUS ETHER

AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR USE OF AN ELECTRONIC TRACKING BEACON ("BEEPER") AS A SURVEILLANCE AID

Richard Rottinger, Special Agent, Drug Enforcement Administration, United States Department of Justice, presently assigned to the Albuquerque District Office and District of New Mexico being first duly sworn, states that there is probable cause to believe that Carl Muehlenweg and other confederates are committing offenses defined in Title 21 U.S.C. 841(a)(1) and 846, Manufacture of Controlled Substance and Conspiracy to Manufacture a Controlled Substance.

Affiant states that on March 3, 1980, Drug Enforcement Administration Agents of the Albuquerque District Office executed a Federal Search Warrant at Locker Number 170 at the AZTEC SELF-STORAGE FACILITY, 3201 Aztec, N.E., Albuquerque, New Mexico. Seized pursuant to the Search Warrant was a Methamphetamine Laboratory consisting of laboratory glassware, laboratory apparatus and precursor chemicals having application in the synthesis of Methamphetamine and Phenylacetone, both Schedule II Controlled Substances. Also seized pursuant to the Search Warrant were the original shipping containers for the laboratory glassware, laboratory apparatus and precursor chemicals bearing purchase order

and shipping invoice numbers indicating the purchase of the above were effected by Carl Muehlenweg, representing GRAPHIC PHOTO DESIGN, 619 Jefferson, Albuquerque, New Mexico.

Affiant states that on April 25, 1980, Drug Enforcement Administration Agents of the Albuquerque District Office executed a Federal Search Warrant at 619 Jefferson, Albuquerque, New Mexico. Seized pursuant to the Search Warrant were purchase orders from GRAPHIC PHOTO DESIGN, invoices and monthly statements from laboratory glassware, laboratory apparatus and chemical suppliers that were consistent with the seizure of laboratory glassware, laboratory apparatus and chemicals seized March 3, 1980. Drug Enforcement Agency laboratory analysis of the laboratory equipment showed amphetamine residue (and more such residue at 619 Jefferson N.E., Albuquerque, New Mexico, the residence of Carl Muehlenweg).

Affiant has verified with Mike Ronsiek, Sales Representative, VWR Scientific Inc. on September 3, 1980, that Graphic Photo Design, 619 Jefferson, N.E., Albuquerque, New Mexico has ordered ten (10) five-gallon cans of Anhydrous Ether. This ether was prepaid by Muehlenweg representing Graphic Photo Design. Such ether (advises Ronsiek) will be shipped to Graphic Photo Design in early September, 1980.

Affiant requests to install the foregoing physical surveillance aid in a five-gallon ether can in order to enable the Drug Enforcement Agency to follow the above items to their ultimate destination (and person(s) using them to illegally manufacture controlled substances in violation of 21 USC 841(a)(1) and 846.

/s/ Richard Rottinger
RICHARD ROTTINGER
Special Agent
Drug Enforcement Administration

Subscribed and sworn to before me this the 12th day of September, 1980.

/s/ [Illegible]
United States District Judge

EXHIBIT J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Docket No. 81-1129

UNITED STATES OF AMERICA

vs.

A TWO-STORY CONTEMPORARY WOOD FRAME HOUSE NORTH OF RANCHOS DE TAOS (AND SOUTH OF TAOS) NEW MEXICO (SEE BELOW FOR FURTHER DESCRIPTION)

SEARCH WARRANT

To Any Special Agent of the United States Drug Enforcement Administration

Affidavit(s) having been made before me by Special Agent Richard Rottinger, United States Drug Enforcement Administration that he has reason to believe that on the premises known as A Two-story wood frame house, north of Ranchos de Taos (and South of Taos), New Mexico. This residence faces north, has a deck on the second floor facing south, and a "stockade" fence along the road paralled to the front of the house. There is a sign or tag at the entrance to the driveway with the words "Meadowwind", burnt into a piece of wood on the stockade fence. This residence is located about 2.7 miles northwest on New Mexico Route 240, from the intersection of Routes 240 and 68 at Taos, New Mexico. There is a telephone pole in front of the stockade fence at this residence, and this telephone pole bears the numbers "83", "20", and "68" on tags on the pole (tags are aligned vertically on the pole). The above premises are known at sight and location to affiant, who will personally participate execution of the Search Warrant District of New Mexico there is now being concealed certain prop-

erty, namely chemicals, equipment and documents which are contraband, instrumentalities and evidence of the manufacture of controlled substances in violation of Title 21 U.S.C. 841(a)(1) and 846 and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of Ten (10) days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search at any time in the day or night * and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before ———————— as required by law.

Dated this 9 day of Feb. 1981

/s/ [Illegible]
Judge (Federal or State Court of Record) or Federal Magistrate

RETURN

I received the attached search warrant February 9, 1981, and have executed it as follows:

On February 10, 1981 at 12:10 o'clock A.M., I searched the person or premises described in the warrant and

I left a copy of the warrant with Michael Gaylord Steele together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Cocaine Hydrochloride
Marijuana
Laboratory Chemicals and Apparatus
Documents
Revolvers: 1. Colt .22 Serial No. 119855
2. Ruger .357 Serial No. 152-10692.

This inventory was made in the presence of Robert Hastings and Samuel Herrera.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ Richard Rottinger

Subscribed and sworn to and returned before me this day of Feb. 10, 1981.

/s/ [Illegible]
Federal Magistrate

EXHIBIT K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Docket No. 81-1129-M

UNITED STATES OF AMERICA

vs.

RICHARD HORTON, et al.

AFFIDAVIT FOR SEARCH WARRANT

BEFORE ROBERT W. MCCOY, United States Magistrate, 10th Floor, US District Courthouse, 500 Gold, S.W., Albuquerque, NM, 87102

The undersigned being duly sworn deposes and says:

That he has reason to believe that (on the person of) RICHARD HORTON and adult occupants of below described premises;

A two-story contemporary wood frame house, north of Rachos de Taos (and south of Taos), New Mexico. This residence faces north, has a deck on the second floor facing south, and a "stockade" fence along the road parallel to the front of the house. There is a sign or tag at the entrance to the driveway with the words "Meadowwind", burnt into a piece of wood on the stockade fence. This residence is located about 2.7 miles northwest on New Mexico Route 240, from the intersection of Routes 240 and 68 at Taos, New Mexico. There is a telephone pole in front of the stockade fence at this residence, and this telephone pole bears the numbers "83" "20", and "68" on tags on the pole (tags are aligned vertically on the pole). The above premises are known at sight and

location to affiant, who will personally participate in execution of the search warrant. Also to be searched are outbuildings at said premises.

Also to be searched are each of the vehicles on the curtilage of the above-described premises at the time of the execution of the search warrant, and all closets, cabinets, rooms, storage rooms, luggage, trunks, containers, cubbards, and other places or items in above residence (and on curtilage thereof) hiding or capable of hiding above-described controlled substances and above-described evidence thereof. Specifically to be searched (whether or not any or all said vehicles are at above premises to be searchcd at time of execution of the search warrant) are the following vehicles:

(1.) RICHARD HORTON's vehicle, 1978 Ford pickup truck, red and white in color, bearing New Mexico license CH-0544 thereon; (2.) A white/red Chevorlet Nova automobile, New Mexico Registration (license plate) BFK-712 thereon; (3.) A 1968 Ford car, light blue in color, New Mexico license plate thereon DLG-193.

Also to be searched is Storage Locker Number 15 at the "U-Stor-It" mini-warehouses, 2640 Baylor Drive, S.E., Albuquerque, New Mexico 87106.

Above premises is located in the State and the District of New Mexico, and there is now being concealed certain property, namely

COCAINE in unknown quantities (packaged, drying, in powder, as well as in liquid or other form); Amphetamine in unknown quantities; any other controlled substances possessed or manufactured contrary to law, in which ether is used as a drying agent or solvent or otherwise used in the manufacture, synthesis, extraction, or purification or drying of said controlled substances; Anhydrous ether, in various quantities; glassware, laboratory chemicals and equipment used or designed for use in extracting, drying, purifying, "free-basing", testing, weighing, dilution, packaging, or other unlawful possession, manufacturing or distribution of Cocaine, am-

phetamines or other illegal controlled substances; WRITINGS and RECORDS showing 'formulae, procedures or methods of extraction or purification of controlled substances (cocaine and amphetamines, especially), customers and sources of said drugs. This evidence constitutes evidence of felony violations of United States Law, 21 U.S.C. 341(a)(1) [manufacturing, possession with intent to distribute and/or distribution of controlled substances] and 21 U.S.C 846 (Conspriracy to commit aforesaid crimes).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: I am a full-time, salaried narcotics law enforcement officer of the US Drug Enforcement Administration, working in New Mexico. I have been a DEA agent for about 10 years, and I have undergone DEA academy training (DEA basic school, 10 weeks; DEA clandestine laboratory and illicit synthesis schools), and worked with DEA chemists and received other training on illegal laboratories and illicit synthesis, extraction, or manufacture of controlled substances (especially Schedule II controlled substances). I have personally investigated and participated in seizures of numerous illegal drug-manufacturing laboratories in New Mexico, and I specialize in investigation, detection, seizure, and prosecution of illegal drug manufacturing or synthesis activities. From such schools, chemists, training, and experience, I am very familiar with the laboratory chemicals and equipment used or commonly used by persons illegally manufacturing or synthesizing, drying, purifying, extracting, or otherwise producing illegal controlled substances. Additionally, from my training, and personal experience as a DEA investigator, and working and talking with fellow narcotics agents and with self-admitted manufacturers, users, and dealers of illegal drugs (especially amphetamines, but also cocaine dealers), I am very familiar with amphetamines and amphetamine labs, and cocaine, and the chemicals and methods used to dry and purify and extract such drugs and the laboratory setups, formulae, and equipment

used to illegally manufacture amphetamines or extract or purify "free-base" cocaine.

In early September 1980, I was advised by a Mike Ronsiek, a self-described sales representative of VWR Scientif, Inc. that approximately 50 gallons of anhydrous ether in 5-gallon cans (i.e., 10 cans of anhydrous ether) had been ordered shortly before then by "Graphic Photo Design" in Albuquerque, New Mexico from VWR Scientific, and that VWR Scientific was shipping this 50 gallons of anhydrous ether in ten 5-gallon cans to Graphic Photo Design in Albuquerque in early September 1980.

Previously, I had participated in an investigation of Graphic Photo Design in Albuquerque, and learned from personal investigation and execution of search warrants and seizures of documents and other items that Graphic Photo Design had (in 1979-1980 period) participated in illegal manufacturing of amphetamines by ordering chemicals and laboratory equipment for persons engaged in illegal amphetamine labs. Indeed, in March, 1980, I participated in a search warrant execution of a storage locker of a Richard Logan, and we found and seized large quantities of laboratory equipment and glassware in the storage locker, and DEA chemical analysis of the residue in such equipment showed residue of amphetamine in the equipment. Also, some of the boxes or packages of equipment with such residue, in the Logan storage locker, had an address of Graphic Photo Design on them. Logan later shot and killed himself in May 1980. However, Graphic Photo Design still exists. Hence, when the above September 1980 telephone conversation between myself and Mike Ronsiek occurred about shipment of a very large quantity of anhydrous ether to Graphic Photo Design, I was very interested. In my extensive training and experience, ether is very commonly used in the manufacturing process of illegal amphetamines (most commonly to extract or dry the illegal amphetamine end product), and also it is commonly used to extract or purify or even "free-base" cocaine. I have not heard of

or learned of any photo studio in New Mexico (or elsewhere) that buys and uses highly flammable, expensive ether in these quantities of 50 gallons.

I participated in monitoring the Albuquerque area trucking terminal that VWR Scientific personel said would deliver or receive the ether. In mid-September 1980, I personally observed 10 cans labelled "Anhydrous ether" from VWR Scientific, at a common carrier premises in Albuquerque. Meanwhile, I had previously ordered a 5-gallon cannister with a "beeper" (a direction-finding transmitter that transmits a "beep" tone and enables direction-finding equipment to locate its position); I planned to use this can—pursuant to Court order—to transfer 5 gallons of ether from its original cannister into this "beeper" cannister, and then surveil the delivery (or customer pickup) of the ether. I obtained a Court Order from US District Judge Edwin L. Meachem on 10 September 1980, authorizing DEA and myself to utilize such a "beeper" cannister, transfer 5 gallons of ether from the 50-gallon shipment into the can, and then monitor the beeper and surveil the "beeper" can (and the other nine 5-gallon cans of ether). Myself and authorized DEA investigators accomplished this prior to any delivery of the ether by the common carrier.

After installation of the ether into the "beeper" can (and leaving intact the other 45 gallons in their nine cannisters), we maintained surveillance on the cans. The cans were initially delivered to Graphic Photo Design. We continued surveillance. On 19 September 1980, Kerry ALLEN picked up the 10 cans of ether and drove them to RICHARD HORTON's residence at 315 Wellesley, N.E.—no one was apparently home—and returned them in the same vehicle back to Graphic Photo Design, with the cans still in the vehicle that Allen drove to and from the Horton residence (we could see the cans in the vehicle before Allen drove off in the vehicle, and then after his return of the vehicle and the cans therein). On 20 September 1980, we could still see the cans in the vehicle

in the street in front of the Graphic Photo Design premises (actually an apparent private residence), and about 10:10 a.m., JAMES CONNORS KARO arrived under our surveillance, retrieved the vehicle containing the 10 cans of ether, and drove them to 1108 Monroe, S.E., Albuquerque. After about an hour, we observed the vehicle (in which the cans were located 19-20 September 1980 in the public street) as it returned to the vicinity of Graphic Photo Design, and we no longer saw the cans of ether in the vehicle. Additionally, using a "beeper" locator (direction finder) we determined that at least the can with 5 gallons of ether in the beeper can was located at 1108 Monroe, S.E., Albuquerque. Later that same evening, again using the beeper locator, we determined that the ether can with the "beeper" in it was now at or in the immediate vicinity of 315 Wellesley, N.E. I walked on the public sidewalk in front of the residence and detected a pronounced and very recognizable odor of ether in the immediate vicinity of (if not actually emanating from) 315 Wellesley, S.E. I have smelled ether on numerous prior occasions, and identified the odor of ether easily emanating from or the immediate vicinity of 315 Wellesley, N.E.

The ether odor continued on 21 September 1980, but within 2 days, the ether (and its odor) no longer smelled as if it were at the Wellesley address. Using the "beeper" locator again, we located the "beeper" can at or in the immediate vicinity of 1803 Rita, N.E., Albuquerque. Later that next evening (23 September 1980) the "beeper" locator shows that the "beeper" can of ether is now located at the U-Stor-It premises at 4701 Cutler, N.E. (I did not determine what specific storage locker, if any, the ether-bearing "beeper" can was in).

On 24 September 1980, pursuant to subpoena on the U-Stor-It company, I learned that "RICHARD HORTON, 1808 Rita Drive" in Albuquerque executed a lease agreement on one of the storage lockers (# 143) in 1979 and still apparently had it leased in his name. The lease

agreement—which I saw—showed Richard Horton gave his address as 1808 Rita, N.E., Albuquerque. Using the "beeper" locator, I narrowed down the area where the "beep" signal was emanating as a row in which locker # 143 was. I walked along the common driveway in front of #143 and smelled again the definite and distinctive odor of ether emanating from # 143. I did not enter or search said locker to get that odor; I could smell it from the common public or semi-public driveway/access road that runs past # 143 and the other lockers in that row).

In October 1980, I obtained a Court Order from US District Judge Meachem authorizing installation and use of an entry tone alarm on locker # 143, which alarm (installed pursuant to that court order on 9 October 1980) would notify us whenever anyone opened the door to said locker #143. Meanwhile, on 8 October 1980, the manager of the U-Stor-It advised me, the manager attempted to contact Richard Horton because Horton was then delinquent on payment/rental fee on # 143, and the manager learned from phoning 1808 Rita, N.E., that Richard Horton was now at another phone number, which the manager provided me. Mountain Bell records show that telephone number to be the telephone located at 315 Wellesley, N.E. The manager advised he contacted a woman at that new number (i.e., at 315 Wellesley, N.E.), who told the manager Horton would soon be at the U-Stor-It to pay the weeks (or months) of delinquent rent payments to the locker].

About 16 October 1980, according to the manager, Horton, in a red and white Ford pickup, retrieved all the contents out of locker #143, before we DEA agents could get to the scene (the entry tone alarm either did not work or malfunctioned; it did not alert us to the opening of the door; only the manager's call to us did).

On 19 October 1980, using the "beeper" locator device (and all still pursuant to Judge Meachem's order authorizing installation and use of the beeper can and a device to locate it), I now located the "beeper" can of ether (i.e.,

the beeper signal itself) emanating at the U-Stor-It, 2640 Baylor Drive, S.E., Albuquerque. The "beeper" did not locate the specific locker in which the "beeper" can was now hidden or concealed. On 20 October 1980, I served a subpoena on this U-Stor-It manager, and pursuant to that subpoena, obtained or observed a lease agreement showing that Locker # 15 at that U-Stor-It was registered to or leased in the name of "Peter ANLIAN", and I previously had detected the odor of ether emanating from locker # 15 by walking along the public access roadway/path along the lockers (even before I served the subpoena on the U-Stor-It manager or saw the U-Stor-It company's lease record for locker # 15). The manager of the U-Stor-It advised me that on 16 October 1980 (same day as above locker # 143 was vacated, 2 persons in a red/white pickup appeared to this present manager, paid $120 cash to cover rental of locker # 15 for the period October 1980-May 1981.

We maintained surveillance at that facility for the next several weeks, and Judge Meachem extended the period for continued use and monitoring of the "beeper" in the can of ether, still emanating from locker #15. On 6 February 1981, we observed (on a videotape from a camera located elsewhere in the area, but not at or in locker # 15 or its curtilage) Richard HORTON and a female apparently unload and bringing out numerous 5-gallon cans into the rear bed of a pickup truck. These 2 persons were obtaining these cans from inside locker # 15 and taking them to the pickup truck and loading them onto the truck. Now, using the "beeper" locator (still pursuant to Judge Meachem's order) we picked up a "beeper" signal in the area of 315 Wellesley, N.E. (i.e., Horton residence), but not, apparently, emanating from within that particular residence. Several minutes later, my fellow DEA agent observed Horton driving the above-described red/white 1978 Ford Pickup truck (License number CH-0544, described above to be searched), and the vehicle parked at 617 Madison, N.E. The "beeper"

locator showed that the can with its implanted "beeper" was now located at the vicinity of 617 Madison, N.E. (we could not tell if the "beeper" can was inside the house at the time, but soon we determined that the "beeper" can was in the pickup. See below). Physically surveilling the area, we observed HORTON and a female bringing boxes and other items from inside the house and loading these items into the trunk of a light blue Ford automobile (bearing license number DLG-193, described above to be searched). No cannisters or 5-gallon cans, that we could see, came from the house into the vehicle. Then, BOTH the pickup truck (followed by above blue Ford) left the area, and DEA physical surveillance followed both vehicles as they travelled along public highways from Albuquerque to Taos; in the surveillance, I used the "beeper" locator (direction finder) and verified that the "beeper" can was in fact in one of the above vehicles, all the way to Taos. This was on 6 February 1981, still.

At Taos, both vehicles stopped on the public highway across from a restaurant/lodge (instead of going into the lodge parking area), and both drivers entered the lodge area. Within a few minutes, another caucasian male accompanied HORTON and the female to the pickup and light car; he entered one of these vehicles, and both vehicles went (under DEA physical observation and surveillance) to the above-described premises to be searched (the house between Ranchos de Taos, and Taos itself), all in the State of New Mexico. When these 2 vehicles arrived at the premises, the occupants went into the above-described premises. For fear of detection, we did not maintain tight surveillance of the residence. However, after awhile (still 6 February 1981), the above pickup, the above light blue car, and another vehicle (a 1974 Chevy Nova, white/red BFK-712, described above to be searched) all left the above premises and returned to the lodge area in Taos. Using the "beeper" locator, I positively determined that the "beeper" can (5-gallon can of ether, described earlier in this affidavit) was now inside

the above-described premises to be searched because the "beeper" locator (direction finder) pinpointed the beeper signal as emanating from the above-described premises. Then, 2 of the vehicles returned to the above premises and stayed there, and the lights in above residence stayed on until at least 1:00 a.m. (now Saturday, 7 February 1981), according to DEA surveillance in the area. Again, later on Saturday (now in the daytime), 7 February 1981, my "beeper" locator still shows a strong "beeper" signal emanating from inside the above-described residence. We continued physical surveillance of above premises via public roads and section roads and other public areas outside the curtilage of above premises. We observed the light blue car and the above pickup on the curtilage of the residence.

We DEA agents personally observed (from areas well outside the curtilage of above premises, in public areas or roads) that the windows and doors of the second floor (at least) of above premises were open to the outside. This was a COLD, WINDY DAY, with wind blowing, temperature near freezing, and otherwise wholly inappropriate for doors and windows to be open to this high, cold area of New Mexico—unless the gallons of ether were being stored and utilized inside the premises and the windows and doors being opened to ensure good ventilation of the premises to prevent hazard to the occupants and/or explosion from any sparks or flames.

The afternoon of 7 February 1981, the above pickup and car left the above premises and returned to the lodge and parked near the above white/maroon 1974 Chevy (BFK-712) (the pickup parked near the Chevy; the blue car made circling and evasive maneuvers as if looking for surveillance, then continued north. To avoid detection, we ceased surveilling it).

Within the past 7 days, I talked with a reliable, confidential informant. I consider the informant reliable and credible because the informant has provided me in the 1980-1981 period with large amounts of information

regarding illicit drug dealing and illicit drug manufacturing, and I have personally verified some of that information (finding it all to be true). The informant is not under arrest, indictment or in jail, nor is the informant seeking or receiving from me any money for below information—or prior information. The informant has made declarations against penal interest in the 1980-1981 period (such as admitting acquiring drugs from one of the above-named suspects under surveillance, within the past 4 months—high-quality cocaine). The informant has no known record of convictions, much less felony convictions. I greatly trust the informant, and have never known or found the informant's large amount of information about drug crimes and drug felonies to be a lie or incorrect. Informant once (within past 4 months) turned over a quantity of cocaine that it (informant) said it acquired from one of the above suspects, and we found the cocaine to be high quality cocaine—as represented by the CI and CI's source(s) above.

The CI advised me that within the past 6 months on various occasions, the CI has personally heard at least two of the persons named above in this Affidavit discussing use of ether to extract COCAINE from fabric (apparently clothing, but at least some type of cloth). According to these persons named above, in conversations within informant's hearing within the past 6 months, HORTON and his confederates get Cocaine in quantities dissolved or hidden in clothing or similar fabric, and they then use quantities of ether to dissolve or extract the cocaine from the clothing or fabric, then evaporate the ether to obtain the pure cocaine from the fabric. CI also advises that it (CI) personally heard at least two of Horton's associates admit within the past 6 months that they have obtained a large quantity of ether and were planning to store it for later use in extracting Cocaine from clothing or fabric. Also, advised the CI, at least one or more of Horton's associates (or Horton himself) stated in CI's hearing within the past 6 months that there is a

house in the Taos area used by one or more of these cocaine/drug associates named above—but CI could not tell me exactly where this residence was. These admissions to CI by above-named associates in the past 6 months have been independently corroborated by my observations, surveillance, "bleeper" use, and physical surveillance by myself and fellow DEA agents as described above.

We checked the registration of the above 1974 Chevrolet Nova, 6-7 February 1981, and according to DMV records, that license on the Nova is registered to Robert N. Steele of Albuquerque. In 1977, according to information to me from my fellow DEA agent involved in the case, Steele is specifically named in a cocaine case wherein a quantity of cocaine was found and seized at an Albuquerque residence by search warrant.

In my extensive experience, the above ether is now in the process of being used in the above-described premises. Th above house to be searched is a private dwelling—a house, not a business or hospital or other place that would ordinarily use ether in any legitimate activity. Ether is very commonly used to dry amphetamine, and also used to dissolve, purify, and "free-base" cocaine by dissolving the cocaine in it and evaporating the ether away and leaving only high-quality cocaine. Indeed, I do not know of any common usage of ether by private citizens (none of above-named persons are nurses or doctors or legitimate lab personnel to my knowledge, investigation, and surveillance), EXCEPT in illegal manufacturing, synthesis, drying, or purification of illegal drugs (primarily amphetamine and cocaine). In my knowledge and investigation of the above group, these persons have engaged in the past in at least illegal dealing of controlled substances, and now make admissions showing their knowledge and intent to import cocaine into New Mexico in clothing or cloth, and use ether to extract it from the clothing, evaporate the ether, and retrieve the cocaine. It should be noted that in our surveillance of the above

Madison avenue address—6 February 1981—just before the above pickup and car left Albuquerque for Taos, we saw the girl and Horton removing boxes from the house and quantities of clothing, which they put into the above light blue car. They did not take any skis with them that I could see, and thus the purpose of this mid-winter, 150 mile trip was not skiing or recreation such as mountain climbing, skiing, etc. (additionally, although the weather in Taos is cold, there is little snow there this year for skiing). And now, on 7 February 1981, the windows (including at least a large window) and door on at least the upper (second) floor of above residence were open wide—despite cold air and winds blowing around the residence and almost certainly reducing the temperature inside above house to near freezing (like the cold wind in the area). Hence, the ether is being opened and used—and not simply stored—in such amounts that they need to ventilate a 2-story house even by near-freezing air to avoid being overcome by ether and/or minimizing chances of explosion. If they were not using the ether inside the house, they would and could easily store it outside (even in a small shed on the curtilage of above premises away from the main building) where the odor would not get into the house, much less require extensive ventilation of the house by opening door(s) and windows on at least the second floor in near-freezing wind.

Therefore, it is likely that the occupants of above house (and occupants of above vehicles) are engaged in the process of manufacturing, synthesizing, extracting, purifying, or at least drying controlled substances inside above premises. We wish to execute this warrant as soon as the process appears complete—which may be at night—to maximize detection and seizure of the drugs, and maximize our abilities to tie all the relevant personnel to this drug synthesis/extraction by enabling continued sur-

veillance of the residence and the persons involved with the ether activities therein.

/s/ Richard Rottinger
RICHARD ROTTINGER
US Drug Enforcement
Administration

/s/ [Illegible]
United States Magistrate
District of New Mexico

SUBSCRIBED AND SWORN TO BEFORE ME THIS 9th DAY OF FEBRUARY, 1981.

/s/ Richard Rottinger
RICHARD ROTTINGER
US Drug Enforcement
Administration

Sworn to before me, and subscribed in my presence,

/s/ [Illegible]
Judge or Federal Magistrate

[DIRECT EXAMINATION OF DEA AGENT RICHARD ROTTINGER BY RESPONDENT HORTON]

[11] Q Can you tell the Court what time it was that you first entered the home or the residence in Taos, New Mexico?

A It was a few minutes after midnight. Actually the morning hours of February the 10th.

Q Twelve, what would that be?

A Approximately fifteen.

Q 12:15?

A Yes, sir.

Q How many people were in the house when you arrived?

A There were four individuals in the residence that were subsequently arrested.

Q How many agents were involved in coming into the premises?

A Several agents from our office assisted by the Taos Police Department and two uniformed officers from the local detachment of the State Police.

Q Did you make—When you say "several agents," how many agents, Mr. Rottinger?

A I would have to look at my 6. But there must have been at least five or six agents from our office.

Q And then other law enforcement officers?

A It would have been the Taos Police Department represented along with the New Mexico State Police.

• • • •

[15] Q Now, where did he make these statements that you claim in this document that you have before you?

A Mr. Horton accompanied myself and Chemist Skinner to that second story bedroom area, and also the balcony that was off the bedroom area where the cocaine —Where a quantity of ether was seen.

The statements of the admission were made to myself and the chemist on the second level of that residence.

Q When you say he accompanied you, did you ask him to go with you?

A Yes, I did.

Q Is there any particular reason why you singled him out of the—strike that.

Did you ask any of the other persons who were arrested to go with you, before you asked Mr. Horton?

A Before I asked Horton, no.

Q Did you ask—All right. Is there any reason why you singled him out to have him accompany you upstairs and to talk to?

A Mr. Horton was one of the subjects of this investigation I had worked.

Q Well, the other persons in the house were not subject of the investigation?

A No. I said he was one of the persons that I had worked.

* * * *

[28] A I don't recall it being that way.

Q Are you suggesting to the Court that he stated to you that he was a participant in the chemical reduction of cocaine from other chemicals, that he led you to believe that by stating that he knew what he was talking about?

A He did not impress me as being a chemist. He did state that he was there to do the final process. I don't know whether that would be considered a reaction or otherwise. But it would have been to precipitate or to come up with a cocaine hydrochloride.

Q You signed an affidavit for a warrant arrest, did you not?

A Several warrants, yes, sir.

Q In this case, I am talking about.

MR. TWOHIG: Your Honor, I think we can avoid having several tests of these affidavits in evidence by just agreeing to one, which is what we are attempting to do now.

THE COURT: All right. I would be all in favor of that.

Q While they're doing that, Mr. Rottinger, is that how you pronounce your name?

A Rottinger.

Q Rottinger. Where it says that Horton further stated he [29] had assisted Steele in the rental of the rural residence, did he describe how he assisted?

A I believe he mentioned that the rental of the home might have been—Michael Steele mentioned it was $400 or $450 a month, and he had assisted in making that monthly payment.

Q $400 to $450 a month?

Q Whatever the dollar amount might have been. He assisted, I believe he said he assisted Steele in the rental.

MR. MARCHIONDO: Your Honor, I notice it is 12:30. This witness will be rather lengthy. I don't know what the Court's plans were. I am just trying to find a document to get over this particular aspect of the examination.

THE COURT: Do you want the Complaint?

MR. MARCHIONDO: Yes, I do. May I approach the bench?

THE COURT: Sure.

MR. MARCHIONDO: Thank you, sir.

Q Showing you the Complaint that was filed before the Magistrate Court, I ask you to look at it, please. The last paragraph, and have you—

A Yes, sir, I read the last paragraph.

* * * *

[41] Q What is their name?

A Evan Roth, Michael Gaylord Steele, William Robertson Harley.

Q Now, referring to exhibit five, the second document in that exhibit is an affidavit, is it not?

A That's correct.

Q And regarding that affidavit, was it prepared by Mr. Blackmer before you went in to see Judge Mechem

or was it prepared after you saw Judge Mechem or during the time that you saw him?

A I believe on this affidavit I prepared the affidavit and brought it to the U.S. Attorney's Office. Mr. Blackmer reviewed it. Together we went to see Judge Mechem.

Q Also in connection with the application of United States for an order, which is the top document, did you prepare that and submit it to Mr. Blackmer, or did he have it prepared?

A Mr. Blackmer prepared it.

Q Was that done after you showed him the affidavit, or do you know?

A I am not sure.

Q And the order itself, which is the third document, who prepared that?

[42] A I believe that was prepared by the U.S. Attorney's Office.

Q You did not prepare it?

A I do not believe so.

Q Looking at the affidavit in the first paragraph, you prepared this after considering the purpose of the affidavit, is that accurate?

A Yes, that would be correct.

Q You say after being first duly sworn, that there is probable cause to believe that Carl Muehlenweg and other confederates are committing offenses defined in certain statutes. You put that language in there, and you swore to it, right?

A Yes. I put that language in there with the assistance of Jim Blackmer of this Office.

Q With his insistence—

A With the assistance—

Q With the assistance of. At that time, you knew that Carl Muehlenweg was not a target for any investigation involving controlled substances, is that true?

A That is not true.

Q Well, regarding Carl Muehlenweg, you had arrested him before, had you not?

A Yes, sir.

Q And when did that arrest take place?

A I believe it was on April 25th, 1980.

[43] Q April 25th, 1980. He was working as an informant on September the 10th, 1980, isn't that so?

A That's correct.

Q You knew that when you made out this affidavit?

A Correct.

Q And he was working as an informant as a result of an agreement between he and the government with the concurrence of his attorney, Mr. Walker?

A That's correct.

Q You knew that at the time you signed this affidavit wherein you state that you had probable cause to believe that Carl Muehlenweg and others are committing offenses against the government?

A Yes, sir.

Q At that time that you signed the affidavit, you were looking to prosecute Mr. Muehlenweg—

A Correct.

Q —for any offense?

A No, that is not correct.

Q Well, at that time, you were not looking to prosecute Mr. Muehlenweg for any offense that may be occurring from this investigation?

A That would be correct, yes, sir.

Q So he was not a proposed Defendant, in your mind?

A He was not.

[44] Q But you put in the affidavit that you were investigating him to cause the Court to believe that he was a proposed Defendant, is that right?

A Yes, sir.

Q And that was not true?

A We were looking at—I was looking at Carl Muehlenweg and the company that he had in as much as

acquiring chemicals. And this investigation and in other investigations.

Q Well, Mr. Rottinger, at the time that you made the statement that he was being investigated as a Defendant or leaving that impression with the Court, that was not true?

A I did not state that Carl Muehlenweg was a Defendant.

Q But you stated that there was probable cause to believe that Carl Muehlenweg and others are committing offenses against—

A That's correct.

Q Well, you knew at that time that Carl Muehlenweg was not going to be a Defendant in any case arising from this matter?

A Arising from this matter, correct.

Q And he was an informant?

A Correct.

Q You did not disclose that to the Judge?

[45] A Yes, we did.

Q In this affidavit, confine yourself to this affidavit on September the 10th, where in the affidavit did you tell the Judge that Carl Muehlenweg was an informant working for the DEA? Show me in the affidavit, please.

A It is not in the affidavit. The U.S. Attorney that accompanied me to Judge Mechem's office, or chambers, explained the situation, why we were before a federal judge as opposed to one of the two magistrates currently here.

The reason being Mr. Muehlenweg's brother was currently a law clerk for the magistrate.

MR. MARCHIONDO: If the Court please, I ask that the witness be instructed to answer the question, and I move the statement he made be stricken.

THE COURT: Do respond to the question. Let's not go over the matter time and time again. Let's get to this and Mr. Smith will ask you to amplify if he wants you to.

Q My question to you, sir, was, will you show me in the affidavit any language that tells Judge Mechem that Carl Muehlenweg is an informant working for the DEA.

A It does not appear in my affidavit.

Q But that was a fact?

A That's correct.

[46] Q Now, you state in the affidavit that on March 3rd, 1980, that you executed a federal search warrant at locker number 170 at Aztec Self Storage facility in Albuquerque. Do you see that in the second paragraph?

A Yes, sir.

Q That had nothing to do with any of the Defendants regarding that search warrant, is that true? Let me rephrase it.

A What search warrant?

Q The federal search warrant at locker number 170 at Aztec Self Storage facility. That search warrant had to do with a Richard Logan.

A That's correct.

Q And only Richard Logan?

A Richard Logan and others.

Q Well, you didn't, in preparing that search warrant and the affidavit, disclose the names of any other person other than Richard Logan regarding the initial affidavit for that search warrant, isn't that so?

A I don't have a copy of that affidavit in front of me.

Q In any event, there is no disclosure in the affidavit, that the search warrant that was issued regarding locker number 170, regarded another person other than the Defendants in this case at this time?

A No. I just stated in that second paragraph that I obtained a search warrant and it was executed at the Aztec [47] Self Storage facility.

Q And then you used in that same paragraph the name of Carl Muehlenweg as being a person who appeared to have a connection with what was located in locker number 170?

A That's correct.

Q And even at that time—strike that.

Then you state on April the 25th, 1980, that you obtained another search warrant and you executed that at 619 Jefferson, Albuquerque, is that right? 619 or 519.

A 619.

Q And you talked about Graphic Photo Design throughout the entire paragraph, and you advised the court that there was amphetamine residue in the items that were picked up when you had the search warrant served on Richard Logan.

A On the storage facility, yes, sir.

Q And in that same paragraph, you did not disclose anything at all about finding any specific glassware or laboratory chemicals when the search warrant was served at the residence of Mr. Carl Muehlenweg, did you?

A Yes. In that same paragraph on the second page, I made mention that amphetamine residue and more such residue was also seized at the 619 address.

Q Excuse me. I see what you are saying. In parenthesis, [48] more such residue was at 619.

A Correct.

Q Before you executed that affidavit, you had discussions with Mr. Muehlenweg concerning some anhydrous ether?

A Correct.

Q The existence of it?

A Correct.

Q When was that first discussion with him?

A I believe it was the latter part of August, 1980.

Q In excess of 10 days before you prepared your own affidavit for your signature to obtain the order?

A Correct.

Q And he had told you that he had ordered 10 gallons of anhydrous ether?

A Correct.

Q And he told you where he had ordered it from?

A That's correct.

Q And you did not disclose that to the Court in your affidavit, either?

A I did not.

Q You did state, though, that he prepaid for the anhydrous ether in your affidavit?

A That's correct.

Q Now, you state that you verified with Mike Ronsiek, sales representative of BWR Scientific, Inc., that Graphic Photo [49] Design ordered 10 5-gallon cans of anhydrous ether. By verified, what did you do?

A I attempted to determine what was taking so long in getting that quantity of ether shipped to Graphic Photo Design.

Q Well, you say attempted. Who did you speak to?

A Mike Ronsiek.

Q When you attempted, what did you—What did you say and ask of him, if anything?

A I asked whether or not his company, BWR Scientific, was in receipt of a purchase order accompanied by a check for a quantity of ether.

Q And he told you?

A They had the check. They had the purchase order, but there had been some problem in putting or capturing the data requested.

Q Did you ask Mr. Ronsiek to expedite the shipment of anhydrous ether?

A Yes, I did.

Q But you didn't tell that to the Court in this affidavit?

A No. I did not.

Q And you asked him that before you prepared this affidavit?

A I asked for a tracer on the ether prior to the affidavit, yes, sir.

Q Well, did Mr. Ronsiek tell you that it would be shipped [50] to Graphic Photo Design in early September or did you ask him or did you tell him to make sure that it is delivered in early September?

A He stated it would be delivered. Subsequent problems were encountered in the trans-shipping of the two carriers from the bay area out here to Albuquerque.

Q In early September?

A Correct.

Q You didn't ask him to have it delivered in early September?

A I asked that it be expedited.

Q Did you know at the time that you made out this affidavit what day it would be delivered?

A No, I did not.

Q And then you asked Judge Mechem to consider to install the foregoing physical surveillance.

And by that, you mean what?

What did you mean by the "foregoing physical surveillance."

A Physical surveillance being the beacon transponder, beeper.

Q In the photo place?

A Yes.

Q To install the foregoing physical surveillance, you meant to be a beeper?

A Correct.

Q You wanted to install it in the five-gallon ether can [51] in order to enable the Drug Enforcement agency to follow the above items to their ultimate destination?

A Yes, sir.

Q Now, would you look at the same exhibit five and refer to the order.

Did you read the order after you received it from Judge Mechem?

A I am sure I did.

Q Well, you are certainly aware of its contents, were you not?

A Yes, sir.

Q Okay. And you say that that was—you are not sure how that was prepared, who prepared it, or what, the order itself?

A I believe that was typed at the U.S. Attorney's Office.

Q And it provides in the first portion of the order, well, first at the top, the preamble states, does it not, application under oath, having been made before me by Special Agent Richard Rottinger, Drug Enforcement Agency, for order authorizing the installation and monitoring of an electronic tracking beacon in a five-gallon can containing anhydrous ether ordered by Carl Muehlenweg representing Graphic Photo Design.

You read that?

A That's correct.

[52] Q And that states you were to—that the application was made as it states?

A Yes, sir.

Q And the court ordered that agents of the Drug Enforcement Administration may install and continuously monitor an electronic tracking beacon in the five-gallon can. It says in the five-gallan can containing anhydrous ether ordered by Carl Muehlenweg, representing Graphic Photo Design, 619 Jefferson, Albuquerque, New Mexico?

Do you read that?

A Yes, sir.

Q You did not install a beeper in a—or tracking beacon in a five-gallon can containing anhydrous ether ordered by Carl Muehlenweg, did you?

A Yes, we did.

Q Are you telling the Court that of the ten five-gallon cans, that came to Graphic Photo Design, or to a common carrier before it got to Graphic Photo Design, that you installed an electronic tracking beacon in one of those five-gallon cans?

A I picked up the ten five-gallon cans from the trucking terminal here in Albuquerque.

Q Excuse me. Would you answer my question.

THE COURT: That's all right. Let him go ahead. What happened?

[53] Q Okay. Fine.

A I picked up the ten five-gallon cans of ether from the trucking terminal. I made the substitution by emptying the contents of one of the five-gallon cans ordered by Muehlenweg into the beeper can prepared by our special testing laboratory.

I then took all the cans, the nine original cans plus our one beeper can to a local paint shop to be painted prior to providing those cans to Carl Muehlenweg.

Q Well, two things, then. You took—you had a special can made up by your special division?

A Correct.

Q And was anything distinctive about it compared to the other nine cans other than the installation of the beeper?

A. Yes. The can with the electronic installation as received by me in Albuquerque was a different color than the cans—

Q I'm sorry.

A Was a different color than the cans as received by the trucking.

Q So to make them all look the same, you had to take the other nine cans, appropriate those and paint those.

A We took all ten cans, including the beeper can.

Q You painted all ten one color?

A Correct.

[54] Q Is that because you could not match the color of the one can that you had made with the other nine?

A Yes, sir.

Q So then what you did is, as you stated, you made up a can, and took the ether and poured it from one of the ten cans into that can?

A That's correct.

Q It already had the beeper installed, it had the beeper installed in the can that you were pouring the ether into, is that right, before you poured the ether into the can?

A The beeper was already installed in an empty five-gallon can.

Q But this court order advised you to—that you may install in the five-gallon can containing anhydrous ether ordered by Carl Muehlenweg.

In other words, into a can that was ordered and purchased by Mr. Muehlenweg, that's what the order stated?

A Yes, sir.

Q So you didn't do that. You did things on your own to what you testified to?

A Yes, sir.

* * * *

[58] Q You did not disclose at that time either that Carl Muehlenweg was, in fact, an informant for you, did you?

A In my affidavit, no, sir.

Q And he still was an informant for you, was he not?

A Yes, sir.

Q His duties as an informant did not terminate at the time that you made this application for this continuation of the beeper?

A He was still an informant, yes, sir.

Q And he was an informant particularly on this subject?

A Yes, sir.

Q You did not tell Judge Mechem in this affidavit that you had, instead of installing a beeper in one of the cans ordered by Mr. Muehlenweg, that you had your own can made up, and installed a beeper in that and poured the ether from one can of the cans ordered by Mr. Muehlenweg into the made-up can? You did not disclose that?

A I did not explain that to the judge.

Q You did not tell him that you appropriated all ten cans and had them painted?

A No, I did not.

Q Of course, you did not appropriate all ten cans by any court order?

A No, I did not.

Q Now, in the affidavit, you state that on September the 20th, [59] James Connors Karo picked up 50 gallons

of anhydrous ether, including the one with the beeper. Did you see that? Did you see Mr. Karo pick that up?

A Yes, I did.

Q You were at—where did he pick it up from?

A From a residence occupied by Carl Muehlenweg.

Q And then in paragraph three you say on September 21st, by using the beeper signal, that the ether was stored at the residence of Richard Horton, is that right?

A That's correct.

Q Well, did you, in fact, at any time on September the 21st, determine specifically that the ether was stored at the residence of Richard Horton?

A Yes. Using the receiving equipment, I was getting a signal from our ether can.

Q In other words, you are saying that you had personal knowledge that the beeper had located this particular can in the residence of 315 Wellsley Place, Northeast?

A I had receiving equipment in my car that would pick up the signal. I had picked up the signal that evening at 315 Wellesley.

Q Well, that residence was not the residence of Richard Horton, was it?

A Yes, it was.

Q How did you determine that?

[60] A Utility checks, telephone subscriber.

Q At 315 Wellsley Place, Northeast?

A 315 Wellsley.

Q Isn't that the residence of Richard Horton's father and mother, Benjamin Horton?

A To my knowledge, it is the residence of Richard Horton and Miss Tara Horton.

Q Well, Mr. Rottinger, you determined in your investigation prior to this date the person occupying the residence at 1108 Monroe, Southeast, to be James Connors Karo?

A Correct.

Q And did you determine the residence of—Didn't you determine that this—there was a residence of Mr. Richard Horton on Rio—some street, I can't think of it—Rio something. Do you recall that residence?

A Rio? No.

Q Excuse me. I'm sorry. 1808 Rita Drive.

A Rita Drive, I believe to be the residence of Benjamin Horton, Richard's father.

Q Now, you advised Judge Mechem that this beeper led you to 4701 Cutler, Northeast, a U-Stor-It, mini warehouse, and you determined then that that was registered in the name of Richard Horton, right?

A Yes, sir.

Q And he had been the lessee of that locker number 143 for [61] approximately two years, or about a year and some months?

A I don't recall the time frame. The lease agreement was in Richard's name.

Q And you determined from the beeper signal that with the ether being in there, you knew then that Richard Horton made at least claim to the locker itself?

A Storage unit locker number 143 was in Richard's name.

Q On October the 7th or 8th, did you rent a locker at the U-Stor-It mini warehouse locker area?

A Did I rent one? I cannot recall renting a locker.

Q You never rented a locker at the U-Stor-It mini warehouse locker?

A I'm sorry. There might have been a rental of an adjoining locker.

Q I'm sorry. I didn't hear you.

A There might have been a rental of an adjoining locker to 143.

Q That would be 142?

A The time frame you asked me, October 7th, I don't recall the date.

Q Well, did you, in fact, rent adjacent to this locker at or about the time that Judge Mechem signed this

order on your affidavit, a locker from the same place where 143 was located?

A I believe we rented a storage unit in that same facility, [62] yes, sir.

Q I asked you, sir, if you did not do it yourself?

A Yes, sir.

Q And before you rented it yourself, you had spoken to the owners of the locker facility to determine who owned 143?

A I had served an administrative subpoena on the resident manager, yes, sir.

Q Did you, at any time, disclose to Judge Mechem that you had rented a unit next to 143?

A No, I did not.

Q You never disclosed that to Mr. Blackmer, either, did you?

A I don't recall whether I have or not.

Q 142 you rented and you installed some video tape equipment, did you not?

A I did not.

Q Did somebody else do that?

A There is no video type installed there.

Q Why did you rent unit 142 adjacent to 143?

A We made application—I made application for an entry tone alarm to be installed on Richard Horton's door, 143. That required running hardware or AC cable to a storage locker. That was the reason for renting the adjoining locker. There was no video at the Cutler address.

[63] Q Let me show you exhibit seven, and have you look at it.

MR. SMITH: If it please the Court, has exhibit six been offered?

MR. MARCHIONDO: Yes, it was offered and admitted. I'm sorry. I didn't mean to respond for the Court.

THE COURT: I'm not keeping a list.

THE CLERK: Yes.

Q (By Mr. Marchiondo) If you look at seven, sir—

A Yes, sir.

Q —you are familiar with seven?

A Yes, I am.

Q Would you tell the Court what it is in the chronology you have it there?

A I have a court order with a date filed with district court October 8th, 1980, signed by Judge Mechem. I have an application for an entry tone alarm signed by James Blackmer, U.S. Attorney's Office.

I have an affidavit prepared by James Blackmer in which I am the affiant.

Q Are those the only documents in that exhibit?

A There is also a copy of the earlier or the initial application for the five-gallon can containing anhydrous ether. My affidavit and Judge Mechem's court order.

Q Signed on the 10th day of September, 1980?

A That's an attachment.

[64] Q For the record, though, are you saying—May I approach the witness, Your Honor?

THE COURT: Yes.

Q Are you saying that the document in this exhibit is prepared by the U.S. Attorney's Office following your affidavit? The application is dated September the 10th at the bottom, the affidavit in support of an application attached to it dated the 10th, and the order, were actually part of the package which consists of the order, which are the first three pages, your affidavit, which consists of seven pages, is that what you are saying that was submitted to Judge Mechem?

A I believe it was submitted as a package, yes, sir.

Q Are you certin of that?

A Apparently.

Q Are you certain of that?

A No, I am not certain.

Q Looking at the application itself, in that—or the affidavit in that exhibit, that you signed, there is some

writing on it. Just tell us the date regarding the writing?

A On my affidavit?

Q Yes.

A Are you speaking of on the last page?

Q Yes, sir.

[65] A Reviewed by the U.S. Attorney, Assistant U.S. Attorney, Jim Blackmer, 7 October, 1980, 2:15 p.m.

Q Did you prepare this affidavit at the same time or about the same time that you prepared the affidavit in exhibit 6, since it is dated the 7th?

A I believe both the court orders were prepared and brought to Judge Mechem on the 7th, yes, sir.

Q So do you recall what day it was that you leased unit 142?

A No, I don't.

Q In the affidavit that you have before you regarding the entry tone alarm inside Mr. Horton's leased locker, do you state anywhere that you were going to rent an adjoining locker for any purpose whatsoever?

A I can't recall. I would have to look over the affidavit.

Q Please look at it.

A It does not mention acquiring an adjoining locker.

Q But you were going to do that before October the 7th, were you not?

A Yes, sir.

Q And you had already made arrangements with the owner of the premises to lease locker 142?

A I made arrangements with the resident manager to lease one of the adjoining—I don't recall the number.

Q Did you at any time before you—excuse me. Did you rent 142 before this device was installed, or afterward?

[66] I am talking about now the tone alarm.

A We utilized the adjoining facility when installation of the entry tone alarm was made. So I don't recall the date the entry tone alarm was installed by our technician.

Q Who was the technician, Dan Baxter?

A Dan Baxter.

Q Did he look at the layout of the property before you went to Judge Mechem to see what you would have to do to install the tone alarm?

A I believe he did. He was out there with me.

Q Did he go to unit 143?

A Yes, sir.

Q Was any effort made to look inside of 143?

A To get into 143, not prior to the court order.

Q Not prior to the tone alarm system court order?

A Correct.

Q After the order you had already had Dan Baxter do the installation, correct?

A Correct.

Q What time did you go to the 143 to install the tone alarm system?

A I would have to look at my report.

Q Would you look at it, just give us the time, please?

A I don't have a copy of it here.

MR. MARCHIONDO: Would you mark this as Defendants' [67] Exhibit—Your Honor, how do you want us to handle Defendants' Exhibits? We had some exhibits on one motion. How do you desire the Defendant mark their exhibits for other motions?

THE COURT: Just however suits you. For purposes of motion hearing, just keep them going in sequence, why don't you.

THE WITNESS: I found my report on that dated October 9th. The installation indicates technician Dan Baxter had installed the entry tone alarm on October 9th, 1980, at approximately 3:15 p.m.

Q Did you have any knowledge that the beeper installed in the can in which you installed it, the beeper itself, had failed to transmit before October the 7th or 8th or 9th?

A No.

Q It did not become faulty at all?

A The beeper in the can, no.

Q No requirement that it be changed?

A Not at that time.

Q Was the requirement that it be changed at a later time?

A No.

Q Did you accompany Mr. Baxter to the unit 143?

A Yes, I was present during the installation.

Q Did you assist in the installation of it?

[68] A I ran some cable for him, yes, I did.

Q Did you get inside of 143?

A To install the entry tone alarm, yes. The door was opened.

Q And you and he got inside that particular storage unit, did you not?

A Correct.

Q And could see the cans in the storage unit?

A Yes, sir.

Q At the time that you filled out your application in exhibit seven, wasn't one of your purposes to install this tone alarm system to make sure that the ether was still in that locker?

A The entry tone alarm would only tell us whether the door was ajar. We still were receiving the signal from the anhydrous ether can.

Q But you wanted to make sure, did you not, before you made application for the tone alarm system, that all of the ether was still in that locker and not just the one can with the beeper in it?

A Until the storage unit 143, until the door was opened, we could not be sure that the entire ten five-gallon cans would still be there.

Q My question to you was, you wanted to make sure that all ten cans were still in that locker and not just the one [69] can with the beeper; thus, you sought the application for the tone alarm system so that you could look inside the area while it was being installed?

A No, you are wrong. The entry tone alarm would be a physical surveillance aide to enable us to know when that door might be opened. It would not tell us whether any of the ether cans had been moved.

Q We understand that. But in order to install the alarm system, you had to get inside the storage unit?

A The entry tone alarm was, in this case, was installed within the door jamb. When the door was opened a required distance, it would activate a signal.

Q I thought you testified that you and Mr. Baxter got inside this storage area?

A To install the tone alarm system.

Q And were you standing inside?

A Yes, sir.

Q And you could see everything in sight in this locker room?

A Correct.

A And you say it took both you and Mr. Baxter to do this?

A I assisted Dan Baxter on the installation. I believe there might have been other agents there outside the U-Stor-It facility.

Q Was there any other purpose of the 142, renting of that unit, beside you say running wires from 143 to 142?

[70] A We ran wires from 143, had to drill out the door jamb through some concrete into the adjoining locker that we had rented. From the adjoining locker we also had to drill and place an antenna. It was an RF signal so we could receive a signal when that door might be opened.

Q Did anybody occupy 142 from the time that it was leased by you to the time that the lease terminated?

A Did we occupy it?

Q Anybody occupy it?

A We had strung some hard wire through that storage unit, yes, sir.

Q I mean any individual from the DEA or any place else get inside the locker 142 and observe 143?

A To observe one from the other, no.

Q Nobody was in 142 at all other than the installation?

A I was in 142 during the installation.

Q And after the installation, which occurred on the 9th of October, then nobody else was in 142 for any other purpose?

A Not to my knowledge.

Q You could have surveilled the 143 locker by having somebody stay in 142, could you not, to determine who was coming and when it was going to be opened and things of that sort? You could have done that?

A I don't believe so, because the lockers, as you said, were adjoining and they were in a common line. I don't [71] think you could see the entry of one from within the other.

Q Now, there came a time when the order that you have there, exhibit 6, terminated. What day did it terminate?

A Exhibit 6 is the extension for the 90 days?

Q Yes.

A January of '81.

Q What date in January of '81 could you state to the Court that it terminated?

A I am not sure.

Q Okay. Now, regarding exhibit 8, if the Court please, at this time, we move the introduction of Exhibit 7.

Can I have a moment before I make that request, Your Honor, to show something to counsel?

Your Honor, at this time, I withdraw my request to introduce exhibit 7.

I am going to hand you exhibit 6, Mr. Rottinger, and have you look at that—Excuse me. Exhibit 8.

MR. SMITH: Your Honor, we will offer exhibit 7. The witness has testified about it, at some length.

MR. MARCHIONDO: The only problem we have at this time, we seriously—

THE COURT: Which is seven, the affidavit?

MR. MARCHIONDO: Yes, the affidavit. The question is whether it was attached.

[72] MR. SMITH: No, it is the whole package, Your Honor. The entire package of order, application, and affidavit filed on 8 October, plus the attachments of 10 September.

THE COURT: You can offer your eight and then you can offer seven on cross examination, Mr. Smith.

Q (By Mr. Marchiondo) You have eight there, sir?

A Yes, I do.

Q By the way, did the tone alarm entry system work that was installed in 143?

A It was operational when it was installed. We had a malfunction. We were not notified by way of signal when the door was opened.

Q Up to the time that that door was opened, you received information it was—are you stating to the Court that there was no video of any kind utilized in connection with locker number 143?

A There was no video on locker 143.

Q Was there any other type of surveillance besides the tone alarm and the beeper that was inside the can, up to the time that the anhydrous ether was removed from locker 143?

A There was no other electronic surveillance.

Q Any other type of surveillance?

A The vehicular surveillance continued throughout the rest of the investigation.

[73] Q Did vehicular surveillance stay constantly on locker 143?

A No. That was the reason for installing the entrance tone alarm.

Q After it was installed, did you continue vehicular surveillance on locker 143?

A On a daily basis, no.

Q How often was that done?

A I can't recall being back there until after the contents of unit 143 were removed.

Q What day were they removed, if you remember?

A I believe it was 16 October, '80.

Q Approximately seven days after it was installed, after the tone alarm system was installed, the contents was removed?

A Correct.

Q Well, Mr. Rottinger, in your affidavit you stated that normal surveillance would not be adequate. You did continue to surveil the 143 not on a daily basis, but you continued to surveil it by automobile, is that correct?

A No, that is not correct. Vehicular surveillance was not maintained on the unit 143, but on subjects of the investigation.

• • • •

[82] Q You did not advise Judge Mechem at that time that exhibit 6, the order of exhibit 6, had terminated?

A I did not.

Q You did not ask to install a new beeper or did not ask for permission to enter upon anybody's property to install a beeper in that affidavit?

A Correct.

Q But you did know at the time you signed the affidavit, submitted that, the order in October of exhibit 6 had expired?

A Yes, sir.

Q Now, after it expired, did you continue to surveil the area where the beeper was located by some other type of surveillance?

A Yes. By the time the latter affidavit, there was video installation, large microwave video installation on storage unit 15 on Baylor, Southeast.

Q Who did you get an order to do that by?

A That was not court ordered.

Q When did you install the video then on the premises where number 15 was located? What is the name of that company, by the way?

A That is U-Stor-It mini warehouse, I believe it's 2640 Baylor, Southeast.

Q Okay. And you installed a video. Who installed it? [83] A Dan Baxter, our technician, again.

Q Do you know what day he installed it in relation to these two orders?

A Early November, as best I can recall.

Q Of 1980?

A Correct.

Q From 1980 then, you had a video surveillance on unit number 15, is that right?

A Correct.

Q And in your affidavit of January the 13th, which is exhibit 9, you did not disclose that to the Court that you had video observation of this unit?

A I did not.

Q Did you determine from Mr. Blackmer or did you tell him that in fact the order of—being exhibit 6, had terminated?

A I contacted the Assistant, James Blackmer, and notified him that our first extension had expired and would be requesting a renewal.

Q And then it was operating from the time it expired up until the time you got the order in exhibit 9, the beeper was operating?

A Correct.

Q And you were monitoring that beeper during that time?

A Yes.

Q Nothing had changed in the type of surveillance that you [84] had used before you sought the order in exhibit 9 that existed before that time and during the time that the order expired in exhibit 6?

A Exhibit number 9, we would have already had the microwave video on the storage unit door.

Q I understand that. But nothing changed in the way that you were surveilling this property by beeper, and by video from the time that the order in exhibit 6 expired up until the time you got the new order in exhibit 9, nothing changed at all?

A By way of microwave video, we were able to determine that no entries had been made into storage unit 15 by way of video.

Q But you kept the same type of surveillance, is what I am getting at. You didn't change anything. From the time that your order terminated.

A Microwave video was not pursuant to court order.

Q You didn't change your surveillance, you had the beeper surveillance still going on at the time that the order had terminated?

A I don't recall whether that weekend or six days or three days, as you said, whether I had receiving equipment in my vehicle at that time.

Q Well, you didn't change anything deliberately, you didn't stop the beeper or quit using it?

[85] I could not stop the beeper.

Q But you did not stop monitoring?

A I may not have been physically out there with the receiving equipment in that we now had microwave video and that showed me that no entries had been made.

Q Where was the video located where you could see it?

A At my office.

Q Here in—

A In Albuquerque.

Q Across the street, or where is that office located?

A In the First National Bank Building, Northeast.

Q Well, in that affidavit that you filed on the 9th to ask for a continuance of beeper, all of that up to that point in time, you had not seen Horton with any cocaine or any other controlled substance, had you?

A Up until what date?

Q Up until the date of January 13th, 1981?

A That is incorrect. December 31st, New Year's Eve, Mr. Horton and Mr. Rob Harley were at the storage unit number 15 as seen by myself on microwave video.

Q Sir, my question was this: Up until you filed that affidavit with the Court in exhibit 9, you did not see Mr. Horton with any cocaine or amphetamines or any other type of drug as a result of your surveillance?

A I did not see Mr. Horton with any contraband.

* * * *

[91] Q And you put in the second paragraph, or the first paragraph of the first affidavit that you had issued a search warrant to search a locker you knew at that time that was owned by Richard Logan?

A Correct.

A And you knew at that time that Richard Logan, at the time that you made out the affidavit, had nothing to do—I mean he was dead, therefore, he would not have anything further to do with anything you found back in March of 1980, when you made out the affidavit, is that right?

A In March of '80, Richard Logan was alive. That was the execution of it.

Q I misstated that. After he killed himself, the day that you gentlemen served the search warrant, which was in March of 1980, is that true?

A He killed himself subsequent, correct.

Q In the month of March?

A I believe it was May 17th of '80.

Q Okay. In any event, he was dead before your affidavit was made to Judge Mechem to ask for permission to install a beeper?

A Correct.

* * * *

[97] Okay. Were you watching the video that was installed and directed against unit number 15 on February the 6th, 1981?

A Yes.

Q And were you able then to see anyone remove anything on that date by video?

A Yes, sir, on two occasions.

Q On February 6th?

A Correct.

Q And weren't you able to identify who that person was?

A Subsequently, yes, sir.

Q When you say subsequent, when did you mean?

A Subsequent to viewing the other video on the 6th, I identified the individual, one of the individuals.

Q When did you first make that identification as to a person being on the video and who was that person?

A The individual on the video in Richard Horton's truck was a Gene Rhodes, accompanied by a Caucasian female.

Q Did you identify her?

A No, I did not.

Q Did you know then it was Gene Rhodes on February the 6th, that was removing items from this locker?

A Did I know by name? No, I did not.

Q By face, you knew it was not Mr. Horton?

A Correct.

[98] Q Is that right?

A Yes, sir.

Q I want to refer to your affidavit under oath on page three, and ask you to look at the last paragraph.

A Oh, I don't seem to have the numbered pages.

Q Oh, is it blocked at the top? You can't see that. You do have it there. It starts out with the language, "We maintain surveillance." Do you see that?

A Yes, sir.

Q Going on to the next sentence, you stated under oath for this affidavit and for the search warrant on 6 February, 1981, we observed on a video tape from a camera located elsewhere in the area, but not at or in locker 15 or its critilege, Richard Horton and a female

apparently unload some—bring out numerous five-gallon cans into the rear bed of a pickup truck.

You stated Richard Horton, and you previously stated under oath here that you knew at that time that that was Mr. Rhodes.

A No. Subsequent, I stated subsequent to viewing the video of February 6th, I identified the male as being Gene Rhodes. Gene Rhodes was operating Richard Horton's vehicle that date. That's why I thought it.

Q Mr. Rottinger, you just testified a moment ago when I [99] asked you on February the 6th, when you looked at the video, it certainly was not Richard Horton, you said, is that correct?

A I know that the video, the male on February 6th at the storage unit was not that Richard Horton, but rather Gene Rhodes.

Q Well, prior to that paragraph, you made several mentions regarding Mr. Horton prior to that particular paragraph. For all the preceding paragraphs, Mr. Horton's name appears and Mr. Rhodes' name does not, does it?

A My first observation in this investigation of Gene Rhodes would be that of February 6th, twice at the storage unit emptying—

Q Sir, I am asking you a question. Before you got this paragraph on page three, dealing with Richard Horton as being the one who removed the items, you discussed at length Mr. Horton's alleged participation in moving around the anhydrous ether, am I accurate in that?

A Correct.

Q You mentioned the fact that he owned, as you put it, a red and white pickup truck?

A Correct.

Q And so you, in order to have continuity with this affidavit, and to give it more substance and to have the person be the same, you inserted the name of Richard [100] Horton as the one who was on the video removing

the chemicals from those lockers when you knew otherwise?

A That is not correct.

Q That is not correct. Let's go on. This affidavit that you signed, by the way, was dated February the 8th, two days after February 6th. Or at least a day-and-a-half. 10:45 p.m., am I right about that?

A 10:44 p.m. Yes, sir.

Q And you certainly knew before February the 8th, 1981, that Richard Horton wasn't the man who was in that video, as you previously testified?

A On the 8th, I did not know that that was not Richard Horton. I did not have Mr. Rhodes identified at that time.

Q Now, you followed that beeper can in the truck on the 6th, is that accurate?

A Yes, I did.

Q And your affidavit, you say you all followed that vehicle and another vehicle up to Taos, New Mexico?

A That's correct.

Q You could see the drivers of the various vehicles, could you not?

A No, I could not.

Q It was at night?

A It was in the evening, yes, sir.

Q And you could not identify the drivers of either vehicle?

[101] A Both vehicles stopped, I believe on two or three occasions going north, but I was not close enough to physically see it. I had some monitoring equipment in my car and stayed behind in surveillance.

Q The only way that you could stay behind them was to continue to follow that beeper signal, is that accurate?

A That's negative. We had a bureau aircraft up at the time.

Q And you had air surveillance as well?

A Correct.

Q At night?

A Correct.

Q Any other type of surveillance besides the beeper and the aircraft?

A Another vehicular surveillance.

Q Behind this car and this truck, or how?

A On most occasions, we would be behind, yes, sir.

Q In your affidavit, after you decided, or recited that it was removed, and you saw these people by video, you say that they were the two persons who were obtaining these cans from inside locker 15, and taking them to the pickup truck and you located them on the truck, and then using the beeper locater, you picked up the signal and followed to 315 Wellesley, Northeast, right?

A The area of Wellesley, Northeast. I was—

[102] Q But it did not stop there?

A I was in the area of Richard Horton's residence. The pickup truck containing the beeper and anhydrous ether did not come to Richard Horton's residence, but rather continued north out of that area.

Q Going on, Mr. Rottinger, were you the one that was following the truck, the red and white truck?

A On what occasion?

Q I am talking about the 6th. I am going by your affidavit, if you will just kind of follow me. I am just asking who was the DEA agent who was following the truck on the 6th of February after the merchandise was removed by Mr. Rhodes and a woman from locker 15?

A Several agents were involved in vehicular surveillance at that time.

Q Were you in one of them?

A Yes, I was.

Q Who else was in the others?

A Agent Hastings, Robert Hastings, group supervisor, Robert Nunning. I believe there was an APD officer, Richard Espinosa. And another agent. I would have to look at my 6 to see on that surveillance.

Q Before you made up that affidavit, you certainly consulted with them on what they saw, did you not?

A Yes, sir.

[103] So you know from their identification plus your own investigation who and what occurred before you prepared this affidavit?

A That's correct.

Q All right. Going on in your affidavit, looking on the next page, page four, you state that the beeper locater picked up a beeper signal in the area of 315 Wellsley, Northeast, but not apparently emanating from that particular residence, which is the Horton residence, is that what you state?

Do you follow that? Have you located that?

A I haven't located that, but that's correct.

Q I want you to follow that because there is something I want to point out to you on that page.

A Where are you?

MR. SMITH: I think Mr. Marchiondo said on the next page. That's still on the page we were talking about.

Q Page four.

A You said the next one.

Q Sorry. Page four.

A Yes, sir.

Q You see the word "residence."

A Horton residence.

Q And continue. The next sentence, several minutes later

* * * *

[DIRECT EXAMINATION OF DEA AGENT ROBERT HASTINGS BY RESPONDENT HORTON]:

* * * *

[108] I could be wrong.

Q Using that day as a date of reference and going back, could you tell the Court when you first got involved with this investigation?

A Of the ether?

Q Yes.

A It was the first part of September.

Q Was it before September 10th, 1980? Was it before Mr. Rottinger obtained authority from the Court to install a beeper in a can of ether that was being purchased by Mr. Muehlenweg?

A We had received information prior to that, that's correct.

Q Did you receive information from Mr. Muehlenweg?

A No, sir. From Mr. Rottinger.

Q In that information, did you know that Mr. Rottinger possessed information that the ether was being purchased for the purpose of extracting cocaine?

A Yes, sir.

Q Was there any discussion that the ether was going to be used for the extract or making up of amphetamines?

A No, sir, not to my knowledge.

Q In fact, amphetamines were never mentioned, to your knowledge, during this investigation?

A That's correct.

[109] Q Particularly cocaine?

A Yes, sir.

Q Did you review the affidavit of Mr. Rottinger in connection with the application made with the Court on September 10th, which is Exhibit 5, concerning the order?

A No, sir.

Q Did you have anything to do with the preparation of any subsequent affidavit?

A No, sir.

Q Now, you were present on February the 10th, 1981. When you entered the premises, were you able to identify any person in there as being any named person that you were aware of?

A No, sir.

Q Did you know who Mr. Horton was?

A No, sir.

Q Did you know him by identification by appearance?

A By description only.

Q Before you walked in on February 10th?
A Yes, sir.
Q And who provided you the description?
A Agent Rottinger.
Q Agent Rottinger?
A Yes, sir.
[111] A Height, weight, color of hair, approximate age.
Q Were you with any of the agents that observed the video that was located on the premises of a U-Stor-It which was aimed at locker number 15?
A Which video? Any video?
Q How many videos were there?
A One. How many tapes; there was three, I believe.
Q Were there more than one video at a location other than at one storage unit?
A No, sir.
Q Just one video?
A Just the one video.
Q Regarding that video, was that set on locker 15 at the U-Stor-It business?
A Yes, sir.
Q Did you have occasion to view any of it prior to February 10th, now, 1981, any of the video reproductions?
A Yes, sir. I observed one of the tapes.
Q Were you observing the tape when anything was removed from locker number 15?
A No, sir.
Q Did you surveil on February the 6th, 1981, a pickup truck, red and white, and a blue automobile?
A Yes, sir.
Q Were you able to identify the drivers of either vehicle?
[112] A I observed the drivers of both vehicles.
Q Were you able to identify who they were?
A Subsequently, yes.

Q By "subsequently,"—what do you mean by "subsequently"?

A After the 10th.

Q After the 10th?

A Yes, sir.

Q And who did you identify driving any vehicles on February the 6th, after the 10th of February, 1981?

A Mr. Rhodes.

Q And anybody else?

A Yes, sir, but I don't remember the female's name.

Q What vehicle was Mr. Rhodes driving?

A The red and white truck.

Q Did you determine who owned the red and white truck?

A Me, personally, no, sir.

Q Did anybody, to your knowledge, with the D.E.A.?

A Yes, sir.

Q Who did?

A Mr. Rottinger. Agent Rottinger.

Q Who owned the truck?

A Mr. Horton.

Q Richard Horton?

A Yes, sir.

* * * *

[116] Q And that was after everybody was secured downstairs?

A Yes, sir.

Q You came downstairs, and then what did you do?

A Placed the people there under arrest and I advised them of their rights.

Q Who is that that you placed under arrest?

A Mr. Horton, Mr. Steele, Mr. Roth, Mr. Harley.

Q And how did you place them under arrest?

A I advised them that they were under arrest.

Q For what, sir?

A Violation of federal narcotics laws.

Q Who was present when you did that?

A All the agents and officer personnel that were in the house.

Q Well, did you have them handcuffed after you put them under arrest, or were they handcuffed when you put them under arrest?

A They were not handcuffed.

Q At all?

A As far as I know.

Q During the time that you were there in the house, they were not handcuffed?

A They were handcuffed later.

* * * *

[120] Q What did you hear Mr. Rottinger say to Mr. Horton at that time?

A I do not recall.

Q Mr. Horton did not volunteer to go upstairs, did he?

Q That, I am not positive about.

Q Did you hear anything at all that Mr. Rottinger said to Mr. Horton just before Mr. Horton and he went upstairs?

A No, sir. I was in another room.

Q But you did see him take him upstairs, then Mr. Rottinger take him upstairs?

A I did see—Mr. Horton accompanied Mr. Rottinger upstairs, yes, sir.

Q And Mr. Horton was not handcuffed at that time?

A No, sir.

Q Did you have anything to do with the preparation of the affidavit for the search warrant?

A No, sir.

Q You did not provide any information in the search warrant that was signed by Mr. Rottinger to obtain the search warrant?

A I gave Mr. Rottinger information of what I observed on the surveillance conducted on February 6th.

* * *

* * * *

[CROSS-EXAMINATION OF HASTINGS
BY RESPONDENT KARO]

* * * *

[124] Q You didn't offer him—did anyone offer him anything, to your knowledge?

A I don't know. Agent Rottinger spoke to him.

Q Did you speak with Mr. Muehlenweg at the time any such arrangements were made, if they were made?

A No, sir.

Q Now, are you aware, Agent Hastings, of what success, if any, Mr. Muehlenweg had in supplying anyone with the D.E.A., including Agent Rottinger, with information with respect to violations of the drug laws committed by others between the period of spring, 1980, and, say, August, 1980?

A Yes, sir. I am familiar with some of the information.

Q Was that information with respect to a man named Logan?

A Yes, sir.

Q Was there any information supplied with respect to anyone else?

A Yes, sir.

Q Who was that?

A Mr. Horton and Mr. Harley.

Q That has to do with this investigation?

[125] A Yes, sir.

Q It didn't have to do with some other acts by Mr. Horton and Mr. Harley other than the ones before the Court here?

A No, sir. Other information was supplied regarding some possible purchase of cocaine.

Q Now, was that prior to August of 1980?

A I am not sure.

Q Let me ask you this: Was there any information supplied, to your knowledge, by Mr. Muehlenweg, about anything other than Mr. Logan, or the matters that

are associated with the investigation which has resulted in this prosecution?

A Not to my knowledge.

Q Not to your knowledge?

A That's right.

Q So the only information that he supplied prior to this was what, with respect to Logan and Mr. Logan subsequently killed himself, is that correct?

A That's correct.

Q And Mr. Logan killed himself before you were able to initiate a prosecution against him?

A Before we were able to get him out of his car.

Q Now, did you discover any contraband on Mr. Logan?

A Yes, sir.

Q At the time that he was—in his car, at the time that [126] he killed himself?

A Yes, sir.

Q Had Mr. Muehlenweg alerted you to the presence of that contraband?

A Yes, sir.

Q How had he done that?

A He advised Mr. Rottinger of what Mr. Logan was going to be picking up.

Q What was that?

A I believe it was either. Maybe methylene. I'm not positive on that. I'd have to check it.

Q Are those chemicals or precursor chemicals that were supplied to Mr. Logan by Mr. Muehlenweg?

A Yes, sir.

Q And did Mr. Muehlenweg supply those chemicals under controlled circumstances similar to the circumstances that the chemicals in this case were allegedly supplied?

A Yes, sir.

Q Did Mr. Muehlenweg supply any other information about Mr. Logan other than the fact that he would be acquiring those chemicals from him?

A Yes, sir. But he did not supply that information to me.

Q Do you know what that information was?

A No, sir. I'm not positive.

Q Have you heard what that information was?

[127] A I really didn't discuss it with Agent Rottinger.

Q So is it your testimony, then, that you have no understanding, as a result of any discussions with Agent Rottinger, as to what that information would have been?

A I'd have to say that at this time, yes, sir.

Q You understand that I'm asking you for hearsay information as well as direct information?

A Yes, sir.

Q And your response is still the same?

A No, sir.

Q What is your response, then?

A Mr. Muehlenweg also supplied us with other information regarding Mr. Logan, other than that one instance where the chemicals were picked up.

Q What information was that?

A It was regarding various associates of Mr. Logan, and what they were planning to do.

Q Who were they?

MR. SMITH: Your Honor, I think at that point we are at the point where the information is sensitive and I'd have to object to further inquiry.

THE COURT: Objection is sustained.

Q (By Mr. Boyd) Let me ask you this, Agent Hastings. With respect to that other information, have you been able to verify that information?

[128] A Only to a certain extent.

Q To the extent that you have verified it, when did you verify it?

A I cannot give you an exact time.

Q Can you give me an approximate time, please?

A Not even that, no, sir.

Q Can you give me a month in which the verification occurred?

A I would say approximately two months after Logan committed suicide.

Q Which would have made it when?

A I'm not sure.

Q Sometime in the late summer of 1980?

A Yes sir.

Q When you say you partially verified it, does that mean that as a result of other information you gathered, that you now more strongly suspect that the information is true?

A Yes, sir, I'd say so.

Q Is that a fair characterization, since we can't go into it?

A Yes, sir.

Q Now, with respect to the investigation which has resulted in this prosecution, isn't it a fact that Mr. Muehlenweg supplied you with, first of all, the [129] nature of the substance which, according to his understanding, would be involved? I think Mr. Marchiondo asked you that before.

A Yes, sir.

Q Isn't it also accurate that he supplied you with the names of all the participants?

A As many as he knew.

Q Who were those that he knew, to your knowledge?

A The only names that were mentioned to me were Mr. Harley, Mr. Horton, Mr. Karo.

Q You do not recall a mention of Mr. Steele or Mr. Rhodes?

A No, sir.

Q And he supplied you with those names and that information prior to the acquisition of ether did he not?

A Yes, sir.

Q So you knew all that. Did he also supply you with information with respect to the manner in which the

cocaine was to be processed? His understanding with respect to the manner that it would be processed?

A His understanding of it, yes, sir.

Q And his understanding that he communicated to you, then, was that it would be brought in in clothes?

A Yes, sir.

Q And that the ether would be used to precipitate it out of clothes?

[130] Yes, sir.

Q Was there any other information that I have not mentioned, and I say I have not mentioned in general that he supplied you with respect to this, the investigation resulting in this prosecution, that I haven't mentioned just now?

A Not that I can think of.

Q That, then, is a fair summary of the information that he did supply?

A Yes, sir.

Q And all of that information was supplied prior to the delivery to Mr. Muehlenweg of the ether from the distributor?

A That's correct, yes, sir.

MR. BOYD: May I have a moment, Your Honor?

Q (By Mr. Boyd) Just to clarify, Agent Hastings, we were discussing earlier in my examination, the investigation with respect to Logan and the investigation which resulted in this prosecution. Those two investigations were unrelated, were they not?

A Yes, sir.

MR. BOYD: Thank you. That's all I have.

THE COURT: Anybody have anything further, nonrepetitive?

MR. TWOHIG: I have a few things, Your Honor.

* * * *

[135] MR. TWOHIG: No further questions of this witness.

MR. BARGAS: I have a few questions.

THE COURT: Counsel, you all have to get organized better than this. I know every lawyer thinks he can do it better than every other lawyer, but you can coordinate better than this. Go ahead and go on with this witness. Between now and tomorrow get organized and coordinate.

[CROSS-EXAMINATION OF HASTINGS BY DEFENDANT RHODES]:

BY MR. BARGAS:

Q Agent Hastings, on February the 6th, you have testified that you have observed Mr. Rhodes in a pickup truck with some cans of ether. Where were you when you made that observation?

Q In my vehicle.

Q Where was your vehicle parked?

A It was not parked.

Q What brought your attention to this pickup truck?

A We had been following it up to Taos.

Q When did you start following it?

A I believe it was around 6:30, somewhere in there, maybe earlier. I'm not sure.

Q Where were you in the State of New Mexico when you first started following this pickup truck?

A I first observed the pickup truck approximately one [136] block east of Mr. Horton's residence.

Q Was the pickup parked at that time?

A No, sir. It was in back of me. Moving.

Q Who was driving it?

A I could not tell at that time.

Q Where was Mr. Rhodes in the truck?

A I could not tell who was driving the vehicle. There was only one person in it.

Q Pardon me?

A There was only one person in the vehicle at that time, and I could not tell who was driving the vehicle.

Q Can you describe what the person looked like who was in that vehicle?

A At that time?

Q Yes.

A No, sir, I cannot.

Q Later on, were you able to get a—

A Yes, sir.

& —a better view?

A Yes, sir.

Q When was that?

A That was when we arrived in Taos.

Q And where were you with respect to the vehicle when you were able to make this observation in Taos?

A The vehicle had stopped alongside the road across the [137] street from the Sagebrush Inn. I was driving by as Mr. Rhodes exited the vehicle and crossed the street.

Q Was anybody with him at that time?

A In the vehicle?

Q Yes.

A No, sir.

Q How were you able to identify that person as Mr. Rhodes?

A We received information after the other subjects in this investigation had been arrested and he was identified through that information.

Q How was he identified as a person driving that truck, directly or through a description to you?

A It was originally a description, and after I saw Mr. Rhodes, I identified him.

Q When did you see Mr. Rhodes?

A Today.

Q Is today the first day that you have been able to identify him from sight?

A Me, personally, yes, sir.

Q Did you read the search warrant before you went into the house up in Taos?

A No, sir.

Q Did you participate in the search?

A Yes, sir.

Q How did you know what you were authorized to search [138] if you didn't read the search warrant?

A I'm just trying to think. Agent Rottinger advised us of what would be or should be at the residence, and that's what we searched for.

Q When you first started following the pickup truck in Albuquerque, what information was brought to your attention to focus your attention to the truck?

A That it had picked up ether at the U-Stor-It locker, and we were to follow the truck when we located it.

Q When you say "We," was somebody else with you?

A Other agents were out on surveillance.

Q Who were they?

A Let's see. There was Agent Rottinger, myself, Agent Skow. I believe Agent Biss. I'm not sure. May have been Agent Walker, also.

Q Who was with you in your vehicle?

A No one.

Q Was Richard Espinoza part of the surveillance team?

MR. SMITH: Your Honor, again, we have gone beyond the establishment of any proble cause.

THE COURT: I would agree.

MR. BARGAS: I will withdraw the question. I have nothing further.

THE COURT: Anything further?

* * * *

[143] MICHAEL RONSIEK,

was called as a witness herein by the Defendant Roth, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. TWOHIG:

Q Would you give us your name, please?
A Mike Ronsiek.
Q And your occupation?
A I am a salesman.
Q For whom?
A For BWR Scientific, Incorporated.
Q Did you have occasion at some point in early September, 1980, to receive an order at some earlier time, an order for ten canisters, ten five-gallon canisters of anhydrous ether from Carl Muehlenweg?
A Repeat the month again.
Q September, 1980.
A Right. Yes.
Q Approximately when was that order received?
A The order was received about the first week of September. Now, it wasn't received by me, it was received in our office.
Q Did you later receive a phone call from Richard Rottinger in connection with that order?
[144] A Yes, I did.
Q Where were you at the time you received that phone call?
A At the time I ws in the Denver office.
Q Could you describe the phone call to the Court?
A Mr. Rottinger mentioned to me that he had an order placed with us through Graphic Photo Design and there was some problem on that order, that all of it had not arrived in a four- or five-day period of time; wanted me to check on it.

So I went over to the order desk clerk and mentioned to her the information I had. And I asked her what the problem was. She then found that we could get ten five-gallon drums as I remember, out of San Francisco warehouse to complete the order. And I said, "Do it."

And the order was complete at some point in time. It arrived here in Albuquerque, I don't know when.

Q Did Mr. Rottinger, when you went back to the telephone and spoke with him, did he ask anything further of you?

A No.

Q Did he ask you to expedite the order in any way?

A Yes. That's the gist of the conversation. He said, "Can you get this on its way or find out what the problem is?" And I got it on its way.

Q And he indicated when he first contacted you that he had had order placed with you by Graphic Photo Design, [145] is that your testimony?

A Yes.

MR. TWOHIG: Thank you. No further questions.

THE COURT: Anything further, Mr. Smith?

CROSS-EXAMINATION

BY MR. SMITH [Government Counsel]:

Q Mr. Ronsiek, when Mr. Rottinger called you, did he identify himself as to whom he worked for?

A Oh, yes. I knew Dick.

Q Had you worked with Mr. Rottinger before?

A No. I had simply given him a current chemical catalog of the products we sell which include precursors and stuff for—that are used for illicit drugs?

Q You know that Dick Rottinger worked for the D.E.A.?

A Yes, I did.

Q Your contact with him prior to the telephone call was in the context of helping him develop information about precursor chemicals?

A Right.

Q Mr. Ronsiek, can you tell us in your experience with what frequency you get orders for 50 gallons of ether?

MR. TWOHIG: Objection; beyond the scope of direct.

MR. SMITH: I will withdraw the question, Your Honor. Mr. Twohig is correct.

[146] Q When Mr. Rottinger called to inquire about this specific 50-gallon order, did he indicate to you whether the order had been placed on his behalf through someone?

A No. He did mention that it had been placed by Photo Graphics Design and—or Graphic Photo Design, whatever the name of the company is. And I am trying to recall the exact context of the conversation.

"We have a company that placed the order with you. And the name of that company is Photo Graphics Design or Graphic Photo Design. And there has been a problem in that we haven't received it yet. Can you find out where the problem lies?"

And I said, "Sure, I can." So I said, Fine. I will do that. And if there is any problem, I will give you call."

But there were no other problems.

Q I understand. Mr. Ronsiek, one last question:

At the time of the phone call from Agent Rottinger, was the name Carl Muehlenweg associated in your mind with Graphic Photo Design?

A No, it was not. I have never heard of that name.

MR. SMITH: All right. Fine. That's all.

MR. TWOHIG: Nothing further.

THE COURT: You may be permanently excused.

THE WITNESS: Thank you, sir.

* * * *

[DIRECT EXAMINATION OF AGENT ROTTINGER BY RESPONDENT HORTON (Continued)]

[155] MR. SMITH: No objection, Your Honor.

THE COURT: It is admitted.

(Whereupon, Defendants' Exhibit Number 10 was admitted in evidence.)

Q On page four—

THE COURT: Which one is that?

MR. MARCHIONDO: That's the affidavit for the search warrant the 9th day of February, 1981.

Q Going down to the, on the top paragraph to the 12th line, starting with the word "physically," do you see that?

A Not on page four of my affidavit.

Q May I approach the witness? No, it's this one here. It's page four numbered at the top. You can't see the number. Do you see that now?

A Yes, sir.

Q You state in your affidavit "physically surveilling the area, we observed Horton and a female bringing boxes and other items from inside the house and loading these trunks—loading these items in the trunk of a light blue Ford automobile."

Did you make that observation yourself?

A Yes, I did.

Q You say Horton on February the 6th, at the address of 617 Madison, Northeast?

[156] A The individual, the male I thought to be Richard Horton, yes, sir.

Q You thought to be Richard Horton?

A Correct.

Q But, in fact, it was not Richard Horton?

A Subsequently identified as Mr. Rhodes.

Q But in this affidavit you have stated as a fact that "We observed Horton" specifically?

A Correct.

Q As a matter of fact, you knew on February the 6th, that Mr. Horton was in Taos, New Mexico?

A I did not.

Q Did you learn later that he was in Taos, New Mexico, and had been up there since February the 5th?

A Subsequent to his arrest by his admission he had arrived at the laboratory site on Thursday, I believe to be the 5th.

Q Okay. Sir, in any event, on this statement, when you say "We observed Horton," it was another person and not Mr. Horton?

A Correct.

Q Now, going further down in this affidavit, when you got to the third line of the next paragraph, where it states "And this is after the vehicle stopped in Taos," you had been surveilling this vehicle by use of the monitoring [157] of this beeper, is that correct?

A Correct.

Q And you saw this vehicle stopped, I assume, on the highway before the drivers entered the lodge?

A Both vehicles were parked on the road adjacent to the Sagebrush Inn.

Q You saw that?

A Yes, I did.

Q You saw them get out?

A Correct.

Q And you saw the driver, both drivers enter—Was it the Sagebrush Inn?

A I saw both individuals cross the street toward the Sagebrush. I did not see them enter the lodge or the motel area.

Q But the lodge you are talking about is the Sagebrush Inn?

A Correct.

Q And then you state in the next sentence, "Another Caucasian male accompanied Horton." That was not Mr. Horton that you saw leaving the Sagebrush Inn, was it?

A Correct. One of the males at that time, would have been now identified as Gene Rhodes.

Q Which male was it, the one that was Caucasian male that accompanied Horton or would be the person you got described as Horton?

]158] A The individual I described in my affidavit as Horton on this occasion would be Gene Rhodes.

Q Now, did you all leave surveillance at the Sagebrush Inn to see who else might be leaving or entering those premises that day?

A That evening, there were surveillance both at the rural residence, the laboratory site, and the Sagebrush Inn.

Q We were talking yesterday about Mr. Horton's physical condition. Did you observe that Mr. Horton was under the influence of marijuana when you saw him in the morning hours of February the 10th, 1981?

A It was not apparent to me that he was under the influence of any drug.

Q At any time did you state to Mr. Horton that all of the persons in the room were extremely high on high-grade marijuana? Did you not make that statement?

A I did not.

Q Did you not make the statement to Mr. Horton that he looked stoned out of his mind and you knew why, because you had found the grass in the house?

A Negative. There was marijuana found on the table and a quantity in the refrigerator. I never made such a statement.

* * * *

[CROSS-EXAMINATION OF ROTTINGER BY RESPONDENT KARO]:

[165] Q You were not investigating any offenses being committed by Carl Muehlenweg?

A With respect to this investigation, no, sir.

Q Were you investigating any offenses committed by Carl Muehlenweg with respect to any other investigation?

A Yes, sir.

Q What investigation was that?

A There was a search warrant executed at a rental dwelling occupied by Muehlenweg April 25th of 1980.

Q Wasn't that investigation over?

A That investigation is still open, currently.

Q What steps have you taken with respect to that investigation since the time Carl Muehlenweg agreed to become a cooperating witness?

A The package, the investigation was forwarded to the U.S. Attorney's Office for review and hopefully for indictment. The case remains open, disposition pending.

Q In other words, it is open depending on Mr. Muehlenweg's cooperation?

[166] A No. There was a death, a suicide by one of the principals in that investigation. And to my knowledge, the U.S. Attorney's Office has not gone forward with that investigation.

Q Well, let me ask you this: Are you now contemplating proceeding to prosecute Mr. Carl Muehlenweg for anything now?

A I would think not.

Q Were you in August of 1980?

A In August of 1980, it was still an open investigation, whether or not he had been a co-defendant named in the indictment or otherwise, I'm not sure on that.

Q Well, now, you had not had any contact with Mr. Muehlenweg for some period of time prior to your receipt of a telephone call from him with respect to this ether, isn't that correct?

A Once Mr. Muehlenweg was established as a cooperating individual, we have a reporting department within the agency that he be debriefed within 90 days. I believe there was a debriefing of Mr. Muehlenweg.

Q Not with respect to this investigation, with respect to the Logan investigation, isn't that correct?

A Correct.

* * * *

[167] A Correct. This investigation was initiated upon Carl being contacted by James Karo ordering the quantity.

Q Isn't it a fact that Carl Muehlenweg contacted you, you did not contact him, with respect to this ether?

A Initially, yes, sir.

Q And at the time that he contacted you, you were not pursuing any charges against him, isn't that true? Against him, Carl Muehlenweg?

A He was still named in the investigation that was provided to the U.S. Attorney's Office.

Q I understand that his name still appeared on a file and I understand that his name appeared in your office at the U.S. Attorney's Office. What I am asking you is whether you were pursuing an investigation against him?

A No.

Q In fact, his entire contact with your office prior to that time had been with respect to the Logan case, isn't that correct?

A Yes, sir.

Q And the Logan case produced, did it not, for you, nothing other than a controlled purchase of precursor chemicals by Mr. Logan, isn't that correct? Isn't that what you arranged through Mr. Muehlenweg?

A No, that is not so.

Q Did you arrange a purchase of precursor chemicals through [168] Mr. Muehlenweg for Mr. Logan?

A Mr. Logan, Richard Logan, had ordered once again a quantity of chemicals and laboratory glassware through Carl Muehlenweg and Graphic Photo Design. We effected a controlled delivery of those items.

This was subsequent to seizing a laboratory from Mr. Logan here in the city.

Q It was subsequent to seizing the laboratory from Mr. Logan—Mr. Logan's laboratory was seized prior to the execution of the search warrant on Mr. Muehlenweg; correct?

A Correct. March 3, 1980.

Q It was the execution of that search warrant on Mr. Logan's locker that led you to Mr. Muehlenweg?

A Correct.

Q And then Mr. Muehlenweg agreed to cooperate with respect to your arresting and prosecuting Mr. Logan?

A Correct.

Q And Mr. Logan engaged—there was a controlled purchase of precursor chemicals through Mr. Muehlenweg by Mr. Logan, is that correct?

A Correct. Chemicals and glassware.

Q And before he was able to reduce those into some sort of controlled substance, you executed a search warrant on him and that resulted in him killing himself, is that correct?

[169] A No. We attempted to effect an arrest of Mr. Logan and he killed himself on May 17, 1980.

Q Had he converted those controlled purchases, those chemicals in that glassware into controlled substances?

A No, he had not.

Q Now, is that a fairly complete or is that a fairly thorough description of the events surrounding Mr. Muehlenweg's cooperation with respect to Mr. Logan?

A Yes, sir.

Q There was nothing more that Mr. Muehlenweg did for you with respect to Mr. Logan other than what you described in general terms?

A In general terms, yes, sir.

Q So, again, in late August and September of 1980, throughout these applications and affidavits where you are describing Mr. Muehlenweg as an offender, and that you are investigating him as an offender, that isn't true?

A Mr. Muehlenweg was already cooperating.

Q So that's not true?

A Yes, sir.

Q Now, in your application, your first application for an order authorizing the use of an electric beeper as a surveillance aide, you state in the last paragraph, do you not, or does not Mr. Blackmer, "This application is based on the sworn affidavit of Special Agent Richard [170] Rottinger, Drug Enforcement Administration, Department of Justice. Does that appear there?

A Yes.

Q It wasn't based just on that, was it? It was based on that as well as some statements that were made to

Judge Mechem in the course of the presentation of these documents to Judge Mechem, isn't that correct?

A Yes. The first time I was before Judge Mechem, the Assistant, Jim Blackmer and myself, went to Judge Mechem with these applications.

Q And you made statements to him outside these applications?

A Correct.

Q About the nature of the investigation?

A Yes, sir.

Q And those statements contradicted some of the statments in these applications, did they not?

A I don't know whether they contradicted.

Q Well, you told him that Mr. Muehlenweg was a cooperating witness and not an offender, did you not?

A Yes, sir.

Q And you told him that this investigation was not really against Mr. Muehlenweg, it was against others?

A Correct.

Q Isn't that correct. And you knew who those others were, is that correct?

[171] A We had targets at that time, yes, sir.

Q But you didn't put those in the applications. Did you tell Judge Mechem who they were?

A No.

Q Did you tell him you knew who they were?

A No.

Q Now, I'd like you to turn now—

THE COURT: Was that reported? Was a court reporter there?

MR. SMITH: If it please the Court, I think I can respond to that question perhaps better than the witness can. I can represent that it was not, Your Honor.

The representations to Judge Mechem, the Government will represent to this Court, were not made in conformance with the oral warrant provision of the Rule.

THE COURT: Can you consider in this hearing, can anything outside of the four corners of the affidavit be considered?

MR. SMITH: Is the Court seeking a response from the United States?

THE COURT: Yes.

MR SMITH: Yes, Your Honor.

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[174] THE COURT: If you want us to, you can get Mr. Blackmer and Mr. Rottinger. I just want to know what the position of the Government is.

MR. SMITH: The position is, Your Honor, to have identified Mr. Muehlenweg as a cooperating individual would have put him in jeopardy, and the idea was simply to avoid disclosing the fact, not to avoid disclosing his identity, but to avoid disclosing the fact of his being in a cooperating position.

I am prepared to call Mr. Blackmer and to explore that with Agent Rottinger when the time comes. I have made sure that Mr. Blackmer is available for that purpose.

THE COURT: You mean in a sealed affidavit that's available only to the Court and the—

MR. SMITH: I thought I'd put him on the stand in open court, Your Honor.

THE COURT: No, no. I am talking about Mr. Muehlenweg would be in jeopardy with a sealed affidavit.

MR. SMITH: Your Honor, I can't respond to that. That decision was taken before I became the attorney on the case.

• • • •

[177] Q But it wasn't on any of the laboratory equipment or glassware?

A At his residence, no, sir.

Q Now, turning to the second page of that document, that is your affidavit for the application for the original beeper, you describe—Well, I have asked you about that. Going to the—let's see, second to last paragraph you say,

do you not, "Affiant has verified with Mike Ronsiek, sales representative, BFR Scientific, that Graphic Photo Design, Albuquerque, New Mexico, ordered ten five-gallon cans of anhydrous ether."

Mr. Rottinger, wouldn't someone writing that affidavit get the impression that what you are saying is that you discovered that?

MR. SMITH: Your Honor, I am not trying to frustrate Mr. Boyd's examination. But these are all matters of conjecture.

THE COURT: Yes, Mr. Boyd, you are wasting time. I will read the affidavit and I will determine what an ordinary person reading—I have already got in my mind [178] fixed on that, how someone would read that affidavit.

There is no point in going through it and what did you intend is—

MR. BOYD: All right, Your Honor. I will move to something else.

Q Mr. Rottinger, in any event, when you say you verified with Mike Ronsiek that he had ordered, the ether had been ordered, in fact, you had caused the ether to be ordered, had you not, after Mr. Muehlenweg called you and asked if he should go ahead and do it?

A I knew at that time that Mr. Muehlenweg had ordered—My statement here is that I verified the order with the sales representative.

Q Now—

THE COURT: Who had ordered from Muehlenweg?

THE WITNESS: James Connors Karo.

THE COURT: Is that the only one you knew at that time?

THE WITNESS: Yes, sir.

THE COURT: You knew that he had ordered it from and that's who it was going to eventually—

THE WITNESS: Correct. He had provided quantities in the past to Karo.

MR. BOYD: Your Honor, given the Court's question, I think there is something that needs to be clarified here.

[179] Q At the time that you verified that order with Mr. Mike Ronsiek, you were aware, first of all, of—you had been told by Mr. Muehlenweg, first of all, that Mr. Karo had ordered it, but, second of all, that Mr. Horton and Mr. Harley and the rest of the Defendants in this room were going to be involved in what Mr. Muehlenweg described as a cocaine transaction, isn't that correct?

A In the initial case opening of this investigation, it was understood from Carl Muehlenweg that Karo would acquire ether and then turned it over to Harley and Horton for an extraction process of cocaine.

Q Did he mention any other names?

A I don't recall at that time.

THE COURT: At that time, you knew of Karo, Harley and Horton?

THE WITNESS: I knew of those names, yes, sir.

Q Now, in addition, you knew Mr. Muehlenweg had told you that this investigation on your part would involve cocaine and not amphetamines, isn't that correct?

A Correct.

• • • •

[181] Q Now, turning to again to the second, the first order—I don't think there is a necessity for giving it to you, Mr. Rottinger.

MR. BOYD: Your Honor, we have already commented on the fact that Mr. Muehlenweg is continually referred to as an offender throughout this.

Q Now, let me hand you Governments' Exhibit 6, if I may. That is, is it not, your first renewal for the beeper?

A Yes, sir.

Q Now, again, it starts out as identifying Carl Muehlenweg as an offender, does it not?

A Yes, sir.

Q Now, moving down to paragraph two, numbered paragraph two on the first page, now, when you say "as observed by the affiant," at the end of that paragraph, did you observe Mr—Did you, yourself, observe Mr. Karo pick up the ether?

A On the 20th of September?

Q Yes.

A Yes, sir.

Q Where were you when you observed that?

A I was in several locations. When I first saw Mr. Karo, I believe I was parked south of the Muehlenweg residence.

Q Did you follow Mr. Karo then?

[182] A Yes, sir.

Q Did you follow him to a house?

A Yes, sir.

Q And you then confirmed after that that he had—through the use of beeper, that he had transferred the ether into his house?

A He transported the ether from Muehlenweg's residence in Carl Muehlenweg's vehicle. He later returns that vehicle and the signal is received from the Karo residence, 1108 Monroe.

Q So all you actually saw then was that he picked it up, took it away full and brought it back empty. When I say "full" and "empty," I am referring to the vehicle.

A The vehicle was returned absent the ten five-gallon cans.

Q After that you determined through the use of the beeper that it was in his house, that the ether was in his house?

A I stayed at the 1108 Monroe. When the vehicle left and I determined with the equipment that the signal was coming from that residence.

Q Now, you did not, however, see the ether transferred from 1108 Monroe to its next location, did you?

A I did not.

Q And you were able to determine its next location on Wellesley by following the beeper signal?

[183] A Correct.

Q Now, again, in that package of documents that you have as an exhibit, again, the order sets forth that there is reason to believe that Carl Muehlenweg, Richard Horton and James Karo, are committing offenses, is that correct?

A That's correct.

Q Carl Muehlenweg wasn't committing offenses, and you had known well before that that Richard Horton and James Karo were to be a target of your investigation, did you not?

A Yes, I did.

Q And you knew it before you made the first beeper application?

A In debriefing Carl, yes, I understood that the chemicals would be acquired by Karo and given to other individuals.

Q Now, another thing I wanted to ask you about, Mr. Muehlenweg, is with respect to Government's Exhibit 9, this is the second application for extension of the beeper, is it not?

A This would be the second extension of 90 days, yes, sir.

Q Now, turning to page—Turning to the second page of your affidavit—Now, as to paragraph 6, how did you know that Richard Horton removed the 50 gallons of anhydrous ether from the first U-Stor-It location?

A I was contacted by the resident manager of U-Stor-It for [184] 701.

Q And he told you that?

A Yes. The entry tone alarm had failed to operate.

Q And he told—Had you instructed him before that to let you know if anyone came in or out of that locker?

A Correct.

Q And did he inform you of any other activities around that locker?

A No, he did not.

Q But he did inform you when they took the ether out?

A Subsequent to the removal, yes, sir.

Q Again, in that document, you describe on the first page Carl Muehlenweg as an offender, do you?

A Yes, sir.

THE COURT: I would suggest don't go through the documents. In spite of common perception among lawyers, a judge can read and often does.

Q Okay.

MR. BOYD: Your Honor, I won't belabor anymore language. It's obvious there are a couple more points I do want to bring out.

THE COURT: Save your time. I want to hear some argument, so don't run yourself out of argument time. As I said, we are going to finish this hearing today. * * *

* * * *

[191] Q Through his invoices?

A Through Carl Muehlenweg providing me with invoices, yes, sir.

Q Now, you go in the last paragraph of that—in the last paragraph on that page, there is the statement, "The source advised me that it was personally present when James Karo spoke in the hearing of the above source within the past two months, that Karo was ordering 50 gallons of ether through another person."

Now, that other person was Carl Muehlenweg, wasn't it?

A Correct.

Q So you are saying that the confidential source told you that Karo was ordering through another person, but the other person was the confidential source?

A Yes, sir.

Q Well, so, in other words, that sentence of that paragraph is totally false except for the fact that there was ether being ordered?

A No, it is not false.

Q There was another person?

A There was other persons in the wording here, Carl Muehlenweg.

Q Well, I am not sure I understand, but I will leave that. It goes on after the words "another person," and says, [192] "And would use that ether to extract and purify cocaine. He, Karo, had, or was expecting to arrive."

Now, Mr. Muehlenweg had told you that Mr. Karo wasn't going to have the cocaine, isn't that correct? It was going to be Mr. Horton and Mr. Harley?

A That would do the extraction, yes, sir.

Q And it was going to be their cocaine, isn't that correct?

A Yes. Also that further to that would be two additional purchases of a quantity of ether that Muehlenweg had provided to Karo.

Q But you were aware, were you not, from Mr. Muehlenweg, that Mr. Karo was not being used to pick up the ether and deliver it to Mr. Harley and Mr. Horton, that he wasn't going to extract and purify the cocaine? Didn't you know that from Mr. Muehlenweg?

A Mr. Muehlenweg did not tell me that Mr. Karo would or would not be there. I was informed by Muehlenweg that Harley and Horton were in charge of the extraction.

Q And it was going to be their cocaine, isn't that what he told you?

A Correct.

Q At any time did you think that it was cocaine that he, Karo, had?

A There was a purchase of a quantity of cocaine from Karo, yes, sir.

[193] Q Well, you are not talking about the small quantity of cocaine, you are talking about the use of the 50 gallons of ether, aren't you, here, when you describe Karo's cocaine?

MR. SMITH: Your Honor—

Q Isn't that what you are speaking of?

MR. SMITH: Excuse me. All of this is addressed at the top of the next page, at the top of page three in the affidavit in exhibit seven. I see no purpose in delaying the hearing further exploring it.

MR. BOYD: Well, Your Honor—

THE COURT: I don't either.

Go ahead.

MR. BOYD: I will go on to the next, Your Honor.

THE COURT: You're eating into your argument time by—just outline your facts directly and then I will hear your argument at the end.

Q Now, let me ask you this, at this time, Agent Rottinger, whose idea was it to create the impression in these affidavits that the confidential informant was other than Mr. Muehlenweg and that Mr. Muehlenweg was an offender? Whose idea was that?

A I had worked on the outset—all of these affidavits had been prepared with the assistance of James Blackmer. They were all reviewed by the United States Attorney's [194] Office prior to taking them before Judge Mechem.

Q Now, going along down on page three of your affidavit, starting at the eighth line down, there is a sentence that starts over on the right-hand side of the page, "The source was unable to identify the person."

Do you see that sentence?

A Yes, sir.

Q The source that you are speaking of is Mr. Muehlenweg, then, are you not?

A Correct.

Q "Was unable to identify the person Horton would have placed the order for ether, Carl Muehlenweg." Are you saying the source identified himself?

A Uh-hum.

Q And that you are trying to—you are saying that that increases his reliability as an informant because he is unable to identify Carl Muehlenweg as the source of the ether?

A Whether that further substantiates or corroborates, I am not sure.

* * * *

[196] Q And so were you?

A I was on surveillance, yes, sir.

Q Now, on page five of that affidavit, Agent Rottinger, have you turned to the page?

A Yes, sir.

Q Okay. Thank you. In the first paragraph in paragraph nine, about the middle of the paragraph, there is a sentence that says, "Indeed as shown in attached Exhibit A, laboratory equipment in this present investigation was concealed at another self-storage locker in Albuquerque when it was received pursuant to search warrant in March, 1980." That laboratory glassware wasn't in this present investigation, was it, it was in the Logan investigation?

A It was a separate investigation. Here again, the commonality was that Carl Muehlenweg had ordered that equipment along with this ether.

Q So anything that Carl Muehlenweg is connected with is this investigation?

A The commonality is that Mr. Muehlenweg was involved with both.

* * * *

[199] Q Now, on page four, when you were following the beeper and you followed it to 617 Madison, Northeast, I take it you did not approach the house?

A That's correct.

Q But you determined, did you not, through the use of the beeper that the ether was at that address, at the house?

A The microwave video earlier that day, there were 12 or 13 cans of ether removed on the storage unit, another two different occasions. The ether was placed into the pickup truck. The pickup was followed to Madison. The signal was emanating from the area of Madison address.

Q So in essence, whose ever house that was, you determined that it was located at that property?

A The vehicle was parked off the road in front of that residence, yes, sir.

Q So was it in a driveway?

A I don't know whether it's a driveway. There's no front lawn in the area.

Q It was on the property?

A Correct.

Q And you were able to determine that through the use of the beeper signal?

A The signal was coming from the area of 617.

* * * *

[CROSS-EXAMINATION OF ROTTINGER BY RESPONDENT ROTH]:

[208] THE COURT: Go on. You are getting to the meat of your lawsuit.

MR. TWOHIG: That's right.

THE COURT: I am interested.

Q What did Mr. Blackmer tell Judge Mechem, as best you recall?

A That the reason we were before the federal judge as opposed to the Magistrate was because of the fact that Carl Muehlenweg named in the affidavit was cooperating and his brother was currently a clerk, I believe for the two Magistrates here in this district.

Q Did he tell him anything else?

A I can't recall anything else.

Q That's the full extent of what he told Judge Mechem during the application for the first affidavit, is that correct?

A That's what I can recall, yes, sir.

Q I mean the first beeper installation.

A The very first order, yes, sir.

Q Was anyone else present in the room with Judge Mechem and Mr. Blackmer and you?

A I do not believe his secretary was in the room.

[209] Q And no one else was present as far as you know?

A To my knowledge, no.

Q Was there any inquiry made by Judge Mechem of any kind either to you or Mr. Blackmer?

A Not that I recall.

Q And do I understand then that an order was presented to Judge Mechem, he was told what you said, you swore to the affidavit, you signed it, and he then signed the order that you brought to him?

A Mr. Blackmer told the Judge the reason we were there. The Judge reviewed the affidavits, the paperwork. I then swore to my affidavit.

Q The Judge then signed the order?

A Correct.

Q One other thing. When you were discussing this—all these details with Mr. Blackmer, did you fill him in as completely as you understood the situation to be as to all the facts surrounding Mr. Muehlenweg up to that time before the first application?

A Yes, sir.

Q Am I correct then that the decision as to how to approach Judge Mechem and whether to include these details in your affidavit was Mr. Blackmer's decision rather than your own?

A To include what details?

Q All the details that were in this affidavit?

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[CROSS-EXAMINATION OF ROTTINGER BY THE GOVERNMENT]:

[216] Q And that is Mr. Muehlenweg's company?

A Correct.

Q Prior to the installation of the entry tone alarm in locker 143, the first storage locker provided for the storage of this ether, had you made any entry at all into locker 143?

A No, sir.

Q Would you tell us, if you can, exactly how the installation of that entry tone alarm was accomplished?

A I assisted an electronic technician, Baxter, from our office, and the entry tone alarm in this case was a button placed within the steel door jamb. It would be on the hinged side of the door. The button was adjustable so when the door was opened more than an inch or two, it was to have initiated an RF signal that we would have received back at the office.

Q RF, initial—

A Radio frequency, as opposed to hard wire. The entry tone alarm was—the button was fitted in storage unit 143 in the steel door jamb. Wires were run through and at the wall of the adjoining storage unit that I had leased from there, and an antenna system was placed on the roof to enable us to transfer the signal from that area back to our office. That was done through the roof of an [217] adjacent storage unit that I had leased.

Q Let me ask you some questions about the purported lapse between the expiration of one beeper order and the entry of a second beeper order on 13 January, 1981.

You have told us that you had installed at that point in time in early November a video surveillance system at the storage locker on Baylor, is that correct?

A That's correct.

Q And that video system allowed you to observe comings and goings in locker 15?

A Locker 15. And other lockers in that same line.

Q How did you receive the transmissions from this video surveillance system, sir, in your office?

A Yes, sir. There is a television console unit in the group supervisor's office. The signal was transmitted from our rented, or our storage unit to the Amfac, back to our building, First National Bank Building, and I could review on a daily basis or review continually the video screen.

Q That went in in early November?

A I believe to the best of my knowledge, early November.

• • • •

[222] Q Agent Rottinger, let me ask you this, if you can recall. Mr. Twohig was examining you with reference to the decision to go to Judge Mechem and present the warrant and the application and the affidavit in a certain form, with certain contents. Let me put the question to you as boldly as I can.

If you can tell us whose idea it was to discuss Mr. Muehlenweg's identity and his function in the way that it was presented to Judge Mechem. Can you tell us whose idea that was? Was it yours, Blackmer's a joint idea?

A James Blackmer had the initial contact with the Magistrate and with Judge Mechem. I was present during the preparation of the paperwork and also in the Judge's chambers.

Q That doesn't quite meet my question. Whose idea was it to set Muehlenweg out in the affidavit without disclosing the fact that he was a cooperating individual?

A James Blackmer.

MR. SMITH: All right. Thank you. I have no other questions of Agent Rottinger, Your Honor.

THE COURT: Anything further? If not, you may step down, sir.

MR. TWOHIG: Your Honor, I anticipate the witness will be a long one.

• • • •

[DIRECT EXAMINATION OF AUSA JAMES BLACKMER BY RESPONDENT ROTH]:

[232] Q So, it's your testimony, then, that the charges would have been pursued, at least a five-year Count, had he not provided the kind of information he did on the Taos operation?

A If he had not worked with and cooperated with law enforcement agents significantly, the Taos operation turned out to be an additional factor that was not part of our agreement, and he came forward on his own and provided us with this additional information and because of that initiative and his assistance, I decided not to proceed with any charges as to Mr. Muehlenweg on the information or the offenses described in these affidavits.

Q Referring you to the Government's Exhibit 5, I would like to ask you to examine it, if you would, please. Do you recognize that?

A Yes, sir, I do.

Q What is it?

A Government's Exhibit 5, the top page is the application for an order authorizing installation and use of a beeper in a can of ether and that's signed by myself.

Underneath it is an affidavit in support of that application and it's signed by U.S. District Judge—I'm sorry, by Richard Rottinger before U.S. District [233] Judge Mechem, and below that, the bottom page is the order authorizing the installation and use of that beeper in a can of ether.

Q Did you prepare any of those documents?

A I'm pretty sure, but I'm not positive I prepared the top page, the application. The wording is something that I recognize, but that's not the typewriter that I ordinarily use. I don't believe I prepared any of the others, but I could have, because I did participate in several of these affidavits.

Q Do you recall what procedure was utilized to prepare these documents before you went up to see Judge Mechem?

A The beeper documents?

Q Yes.

A Either Richard Rottinger and his office typed them and brought them to me for review, or he brought them to my office and I typed them, or occasionally would retype them. In each instance, nevertheless, as to all of these various affidavits, I at least reviewed them, every one in which I was the applicant.

Q As to the specific affidavit that's in Exhibit 5, begins with the second page of Exhibit 5, would you give us your very best recollection as to how that specific document was prepared?

A As I recall, this is the first one of the documents that [234] we sought to put a beeper in a can of ether and I believe it is, because it was late September or early October when we did this. Agent Rottinger gave me a call and I was engaged in other activities, and I talked to him about the recommendation that an order should be obtained, even though there's quite a bit of law that says you really don't need an order to install a beeper in a can of ether, especially before it ever gets to the recipient. But I advised it would be a good idea to take an application and an order to a Judge and have him review and pass upon it and if he felt it was adequate to issue an order.

We discussed how to safeguard the identity of the status of the informant, Karl Muehlenweg, and we reached an agreement, I believe, or at least I made the suggestion that a good way, hopefully, to protect his safety would be to name him straight out rather than to put him in as a confidential informant and then the very details of his information, which was privy to only very, very few people, would then essentially reveal his identity as well as his status as an informant, regardless of the outcome of the beeper and the investigation.

So, we decided there's another reason, also. I also pointed out to Mr. Rottinger that Karl Muehlenweg was a clerk or assistant to Judge McCoy who ordinarily would [235] review this, and we wanted to make sure that Judge McCoy knew that Karl Muehlenweg was involved in this particular case before the Judge, McCoy, was passing upon the validity of the province of his own clerk.

So, I believe, but I'm not positive, that Agent Rottinger or his clerks at the DEA office tied up the affidavit and brought it to me and I either typed the application or had it typed.

Q And you reviewed the affidavit?

A Yes, I did.

Q Let me see if we can discuss for a moment these two reasons for indicating that Mr. Muehlenweg was a participant rather than an informant. That's what you suggested to him, is it not?

A No. I suggested to him that he point out in the affidavit the actual name of Karl Muehlenweg throughout this thing. But not to put in the affidavit his status as an informant, his identity, this fact that he was, in fact, working for the law enforcement office as an informant for at least those two reasons that I just told you.

Q Now, the first reason is to protect his identity?

A No. To protect his status as an informant, because regardless of the outcome of the investigation, assuming that it wound up in a dead end on this beeper thing, nevertheless, if it was unsealed and made available to [236] the various targets, they would not realize, hopefully, that Mr. Muehlenweg was, in fact, cooperating with the agents, they would still hopefully trust him, since we would have a person in there able to monitor possibly criminal activities, whereas if they knew that he was working with law enforcement officers, his usefulness in this case would be zero at least and very likely, in my opinion, his safety or life could be endangered.

Q So, you wanted to, as a result of those, that reasoning, you wanted to have Muehlenweg named in the affidavit in some way that would not identify him as an informant?

A Right. Not reveal his status as an informant, that's correct, a knowing informant for the Government.

Q Did you suggest that the best way to do that would be to have it appear that Mr. Muehlenweg was, in fact, committing the crimes?

A Well, he had been committing the crimes up to the point that he cooperated with us, and wanted to put the truth in there as to those particular facts. We did not want to put too much additional information that we had, which I think would have been—enhanced his probable cause even more in the affidavit, because that would reveal his status as an informant and end his usefulness the instant anyone saw this affidavit, and perhaps his life.

Q Mr. Blackmer, did it occur to you, at all, that it might [237] just be that you were creating the impression in that affidavit in order to get probable cause, that Mr. Muehlenweg was, in fact, not cooperating and was, in fact, a target of an investigation?

A I did not intend to create that impression whatsoever. One of the Judges before whom this would be brought, in fact, this was made specifically known to the Judge each time, this as well as other affidavits were brought to him that Karl Muehlenweg was a cooperating individual.

However, I did not want the Defendants or targets of the investigation, upon seeing the affidavit, to reveal, to realize the true status of Mr. Muehlenweg and end his usefulness to us, if not worse.

Q Did you consider an alternative method of doing that; for example, having the order personally sealed in some way?

A I don't know if that would be possible, permanently sealed. Under the Wiretap Statutes which really don't apply to a beeper, but we use them as kind of a guideline

that at the end of ninety days at the conclusion of an investigation, a Judge must notify the targets, and we felt that there was a strong likelihood that if a Judge issues an order directed toward certain targets within a certain period of time in conclusion of those orders, that these targets would be notified and/or [238] these would be unsealed and made available in public record.

Q Under what statute?

A The Wiretap Statute, because it generally uses a guideline. There's no statute that I know of that pertain to beepers.

Q And you considered that that may apply to beepers?

A No. We used it as a guideline and we felt that very likely as Court practice would be that they would reveal, notify the targets of the issuance of a beeper order or at least unseal it such that it would be made available as public record.

Q Did you operate under the assumption that it was proper to advise a DEA agent to make a false statement under oath for the purposes of concealing the identity of an informant?

A Absolutely not. In fact, we insisted that all statements in the affidavits were totally true. I do know that we had further true information that was not put in there in order to protect the informant's status as an informant, Mr. Muehlenweg's status as an informant. But everything in there was put in there as truthful and I insisted upon it.

Q Is it your understanding that everything stated in that affidavit is true?

[239] A Yes. According to the information that DEA Agent Rottinger gave me, it's all true.

Q Do you think it's misleading?

A Perhaps to the targets of the investigation who would not know all the background information we orally told the Judge. But we do not think it's misleading as to the Judge; one, because it's true, and two, because the Judge was specifically advised on each occasion that Karl

Muehlenweg was, in fact, working with us as a confidential source.

Q You agree with me, do you not, Mr. Blackmer, that if all the information pointed out in this affidavit that Karl Muehlenweg was a target was eliminated, everything that would indicate that Karl Muehlenweg was a target was eliminated, and everything that goes toward probable cause related to Karl Muehlenweg being a target was eliminated, there would be no probable cause in that affidavit?

A If probable cause is even required for a beeper affidavit, you're probably right. I haven't looked through this word for word. It would delete a great deal of this affidavit.

Q But you have certainly gone over that in preparation for testifying here today, have you not?

A I have not. I haven't seen these affidavits, outside of [240] seeing them in general, like on a person's desk for the past several months.

Q Were you aware when you applied for this affidavit that in the absence of the information we are speaking of, there would not be probable cause as far as this document was concerned?

A Absent the information that you just described?

Q Yes, sir.

A In the affidavit, yes, although there would be enough information from other sources that I think could have been put in there. However, we were not at all convinced an order was even required, but we decided to seek one out of an abundance of caution and to protect not only the right of the various targets, but also because of the DEA.

Q I understand, sir. Now, had Karl Muehlenweg been an informant and a cooperating individual for DEA since May 20th, 1980?

A It was approximately that time. It was shortly after the execution of the Search Warrant at his resi-

dence and at T and M Company. I don't know an exact date, however, but for sure, late in the spring of 1980, through February of this year, at least, he was a co-operating informant.

Q Did you have sufficient information upon which to make [241] a determination as to whether an allegation in an affidavit could be made that he was a reliable informant?

A Yes, sir. You mean, without revealing his name?

Q Yes.

A Yes, sir.

Q And you thought that such information might exist, is that correct?

A I knew that it did exist, at least according to Agent Rottinger.

Q Then, it's your testimony that usually there's an alternative method of obtaining probable cause and you chose not to use it?

A That's right. There is an alternative method of showing probable cause; and furthermore, there is another method to show even a further probable cause. That is credibility of the informant besides naming him in the affidavit.

Q In other words, you could have submitted an affidavit to the Court as is truly the practice in drug cases saying there's a confidential unnamed informant, that he's provided the following information, and upon the basis of that, gotten this order?

A That would be one way to do it, also, or a combination of the two, naming him as well as appointing out he was working as a confidential informant and showing his [242] background for liability.

Q Now, you said that there were two reasons for doing it this way. The first reason involved protecting the identity and the usefulness of the informant?

A Protecting the status of him as an informant and his usefulness in this case, and hopefully others, too.

Q And the second reason involved something concerning his brother. I didn't quite understand that. Could you clarify that?

A Yes. His brother, Mr. Muehlenweg's brother, at that time was working for Judge McCoy, the Magistrate who ordinarily issues these Search Warrants and beeper orders. We wanted to make absolutely sure that Judge McCoy knew that Karl Muehlenweg was involved in this case before he, Judge McCoy, was passing upon essentially his own clerk's brother and his reliability or accuracy.

Q Did you take this affidavit to Judge McCoy?

A I did, yes, personally, and advised him of the fact that Karl Muehlenweg in this case was actually working now as the confidential source for the United States, the DEA.

Q Did you ask Judge McCoy to issue the Search Warrant?

A Well, I brought it to him first to see what he wanted to do with it, being that Karl Muehlenweg was the brother of Judge McCoy's clerk.

* * * *

[246] Q When you went in Judge Mechem's chambers, did you sit down?

A Yes.

Q Both of you?

A Both of us did.

Q What occurred after you sat down?

A Well, at that point, immediately upon handing this to Judge Mechem, I explained why we were coming to a District Judge instead of a Magistrate.

Q What did you say?

A It was primarily that Karl Muehlenweg was the brother of the Magistrate's clerk. And I also advised Judge Mechem in detail that Karl Muehlenweg was working with the United States Drug Enforcement Administration as a confidential source or an informant, but we

didn't want to put that in the affidavit itself because this would reveal his status and end his usefulness to us, regardless of the outcome of this investigation.

Q Before you said that, did you raise your right hand and swear to tell the truth?

A No, sir, I did not.

Q You were not sworn?

A No, I was not.

[247] Q These are unsworn statements?

A That is correct.

Q Why did you do that as an unsworn statement?

A Well, I wanted to make sure that Judge Mechem knew two things; one—or three things, really—one, why we were coming to him with a beeper order instead of the Magistrate; two, that the Magistrate had asked us to take it to Judge Mechem because Karl Muehlenweg's brother was a Magistrate's clerk; and three, to make absolutely sure that Judge Mechem was not misled in any way by the fact that Karl Muehlenweg in the affidavit, although named, was actually working as a cooperating individual for the law enforcement offices.

Q Did you suggest to Judge Mechem that before you began speaking to him that possibly a Court Reporter should be summoned?

A No, I did not.

Q Did you in any way make an affidavit and submit it to Judge Mechem—

A About that?

Q —so he would have some written record, so we would all have some written record of what occurred there?

A No, I did not.

Q Why?

A Well, if I did that, then again, this would be filed [248] with the affidavit application here and it would become a public record upon the unsealing of this or upon notification of these various persons and their success in unsealing it, which would again do exactly the

same thing we were trying to avoid; that is, identify Mr. Muehlenweg as a Government informant and end his usefulness in this investigation, if not worse. Plus Judge Mechem, of course, did not ask me to make that, although I certainly would have been willing to if he had asked or ordered it.

Q Did you, at each subsequent time that you spoke to Judge Mechem for further extensions or further applications, speak to him off the record?

A I don't know about off the record. I didn't say off the record. We just told him there in his chambers that this is the same Karl Muehlenweg, it is the same investigation and the same beeper order concerning the cans of ether and that he was still working, the Karl Muehlenweg was still working with the DEA as a confidential source throughout all these affidavits. However, no record was made, if that is what you mean.

Q There was no record made and none of those statements were on the record?

A None of the statements by me were under oath and no stenographic record or tape recording was made, to my [249] knowledge.

Q For what reason?

A The same reason; that is, we didn't want to put the affidavit or the record in there as part of this affidavit, which if it was ever revealed to any of the targets after notification to them, even if the investigation went nowhere, they would identify and realize Mr. Muehlenweg was a confidential source and end his usefulness to DEA, if not worse.

Q Mr. Blackmer, we have spent about two hours here this morning, painstakingly going through each of the affidavits, each of the sworn statements of Mr. Rottinger dealing with a variety of apparent misrepresentations and inconsistencies. I don't want to take all that time with you, but let me ask you this question as to those in general.

A Yes.

Q Were there misrepresentations and inconsistencies contained in those documents which you drafted or helped draft, which were for the same purposes, essentially, as you have set out here?

A I haven't looked through these things word for word to see if there is any inconsistencies in there. I would tend to doubt that there are, but the documents speak for themselves.

* * * *

[257] Q But as far as the knowledge that you actually had, would I be correct in saying that you knew that there really was no connection with the earlier Muehlenweg-Logan proposition, the one that's in exhibits, the exhibits I just showed you, the Defendants' exhibits and beeper application, except for the fact that Muehlenweg was your informant?

A No, I would not say that that is accurate. Ether is also used for, in the manufacturing of amphetamines. However, as I understand it, for the most part, Mr. Muehlenweg was providing information tending to show that this ether, or at least a large part of it, was intended for use to synthesize cocaine out of fabric, and not for— [258] he didn't mention that it was not for amphetamines, but he didn't go into detail on that. But he had no way of controlling exactly what it was to be used for. He was the purchaser for the ultimate users and it's used for those two purposes, especially in the manufacturing of amphetamines.

Q Mr. Rottinger didn't tell you that Muehlenweg said this was going to be used for cocaine?

A He told me that Mr. Muehlenweg's information was that it was intended for use, at least in part, for cocaine.

Q Let me show you a couple more items before I finish up here.

Let me show you a copy of the affidavit for the Search Warrants in Taos, Mr. Blackmer, which is in evidence,

Exhibit 10, Government's Exhibit 10, where it's marked 4 and 5—excuse me, I can show you that better with the exhibits.

Could you read the paragraph I've indicated to you, to yourself, where it says, "There's a reliable confidential informant"?

A Just to the end of the page?

Q Yes, sir. Now, that is information that is in the affidavit for the Search Warrant on the Taos house, which refers to a confidential informant.

A That's correct.

• • • •

[CROSS-EXAMINATION OF BLACKMER BY GOVERNMENT]

[265] Q And in your own best professional judgment, the alternative you chose was the best one consistent with security in the investigation and consistent with the candor required of application for Federal Court Orders?

A Both. I would like to have put on even more facts and information showing his reliability, but we could not do so without revealing his identity and end his usefulness in this investigation, if not worse.

Q Are you still of some concern, now, with the events having taken place, are you still of some concern about the possibility that such applications might become public record through one device or another?

A Definitely. In every case, in fact, I assume that it's going to become public record at some point, either through a Freedom of Information Act request by somebody or after notification that an Order has been entered or in connection with a prosecution, as one of these investigations turns out to be successful.

Q I want to leave no misimpression or suggestion to the contrary, Mr. Blackmer. You have uttterly no reason to believe, either through laxness or otherwise, that any-

one in the Court offices might inadvertently let these things become public, that's not a genuine concern?

A Not a genuine concern, but it can happen, something [266] could be unsealed or somebody, maybe for dishonest purposes, goes in and takes off the—

Q But you have no reason at all to suspect that in this case, do you?

A No, not in this case, and not in general in this Federal Court.

Q All right. I wanted to make that clear, Mr. Blackmer.

Can you tell us whether, when you obtained the Search Warrant for Meadowind, itself, Exhibit 10 and its attachments, whether there were any oral representations to the issuing Magistrate?

A Not that I know of, but I wasn't at the Magistrate when Mr. Rottinger took that there.

Q None were made by you, in any event?

A That's correct. I didn't call the Magistrate, or anything. In this affidavit, by the way, for the Search Warrant, we can talk about a confidential informant in that case because there are three or four people that had the information that Muehlenweg had and that would tend to protect him there, like calling him a confidential source. But if we named him only and didn't name some of the other people that were in there, that right away would focus suspicion on him.

MR. SMITH: All right. Thank you. I have no further questions of Mr. Blackmer.

* * * *

[275] THE COURT: All right. Fine.

MR. SMITH: Your Honor, with reference to Mr. Muehlenweg, he has not, as I understand it, been subpoenaed to the hearing. I've been in touch with him telling him to be ready on a half hour's notice to get from where he is down here. I didn't know until now that defense wanted to call him. I can have him here in a half an hour. I'll have to make a phone call.

MR. TWOHIG: Your Honor, if I may indicate this: I think Mr. Smith will agree, he said when we first started our discussions of the proceedings as to these Motions, he said he would have Mr. Muehlenweg available and we have relied on that. We could take another witness.

THE COURT: Let's not get into an argument on that. He'll be here. Call another witness.

MR. MARCHIONDO: Call Mr. Horton.

THE COURT: Come forward.

RICHARD M. HORTON

was called as a witness herein on his own behalf, and after having been duly sworn, testified upon his oath as follows; [276] to-wit:

DIRECT EXAMINATION

BY MR. MARCHIONDO:

Q Mr. Horton, would you please state your name, please?

A Yes, sir. Richard M. Horton.

Q And you live here in Albuquerque?

A Yes.

Q Mr. Horton, were you in Albuquerque on February the 6th, 1981?

A No, sir.

Q Where were you?

A I was in Taos Ski Valley.

Q And when did you arrive in Taos Ski Valley?

A I believe it was on a Thursday afternoon on February the 5th, the day before that.

Q Now, do you remember your arrest on February the 10th, 1981, in the early morning hours?

A Yes, sir.

Q Would you tell the Court whether or not before the police entered the Taos residence, if you had engaged in the smoking of any type of narcotics?

A Yes, sir. We had been smoking marijuana.

Q And you say "we." Who was doing that?

A The four individuals, me and the other three individuals in the house.

* * * *

AFTERNOON SESSION

[287] The Hearing on Motions was continued on the 12th day of May, 1981, at 1:30 o'clock P.M., as follows:

THE COURT: Call your next witness.

MR. MARCHIONDO: Before we do that, may I state to the Court, Mr. Twohig and I want to make sure that all of the Defendants receive the benefits of thorough investigation in this matter, and after hearing the testimony of Mr. Rottinger and Mr. Blackmer, conferred with Judge Mechem in the last three or four minutes, and inquired of him what he recalled about this particular matter. He does remember bringing in the affidavits. He does remember some discussion, and when asked the question if he was told that the person named in the affidavit was also a confidential informant, he said he does not remember that. When asked if he merely confined himself to the four corners of the affidavit, he stated yes.

We don't know precisely—we don't want to—if it is proper to call a Federal Judge, we don't like to call a Federal Judge.

THE COURT: I was going to ask if any of you had enough nerve to try that.

MR. MARCHIONDO: I cross-examined a Federal Judge in California in a civil case, Judge, and that was tough.

THE COURT: You may try if you want. I won't issue any subpoena.

* * * *

[DIRECT EXAMINATION OF RESPONDENT HARLEY]:

[299] A Yes, sir.

Q And who leased the premises?

A Michael Steele.

Q And do you know how much it was that the rent was to be paid monthly on?

A It was $450.

Q Did you pay for the rent, or at least a portion of the rent on that house in Taos?

A Yes, sir.

Q And, Mr. Harley, did you have a key to the premises?

A Yes, sir.

Q And, Mr. Harley, did there come a time after your arrest in Taos, New Mexico, whereby you had a conversation with the landlady?

A Yes, sir, I did.

Q Did there come a time after your arrest and after your conversation with the landlady, that something transpired with reference to a refund?

A Yes, sir. She gave me back a check for $450 in my name.

Q And gave it back to you?

A To me, yes.

Q In your name?

A In my name.

Q Now, do you know what that $450 was for?

A That was for the last month's rent.

[300] Q You were talking about the last month's rent. Had the month of February of 1981 been paid?

A Right, it had. This was for the month of March.

Q Now, I want to direct your attention back to the day on or about August of 1980, the latter part of that month. Did there come a time when you were interested in purchasing some ether?

A Yes, sir.

Q And in reference to that, what did you do by way of acquiring this ether?

A I gave a thousand dollars to James Karo.

Q Who else did?

A Richard Horton did.

Q And you gave a thousand and Richard Horton gave a thousand. Did Karo put up any money?

A I believe he did put up another thousand.

Q And in reference to that, was this for the purchase of that ether that we are talking about?

A Yes.

Q And it is the subject of this case?

A Yes, sir.

Q Did there come a time after the ether was acquired, Mr. Harley, that it was later transferred to certain lockers?

A Yes, sir.

[301] Q I want to talk to you, first of all, about the locker designated as 143. Who rented that locker?

A Richard and I did, but it was under Richard's name.

Q Did you pay the rent for that locker?

A Yes. We split it on and off.

Q Did you have a key to that locker?

A Yes.

Q Did there ever come a time during the time that you leased locker 143, that you would go to the area of the locker?

A Yes, we periodically went to check on everything.

Q All right. Now, I want to talk to you about locker 15 there at the U-Stor-It. Who leased that locker?

A Richard also leased that.

Q Did you have anything to do with that locker?

A Yes. I helped pay rent on that, also.

Q Do you recall how much rent was paid and when it was last paid?

A I paid $120 in, I believe, October of '80 for six months' rent.

Q And did there come a time when you would check by locker 15?

A Yes, periodically, we would go by and check on the contents.

Q Now, with reference to that house, let me ask you one [302] further question. With reference to the house there in Taos, other than you and Steel, was there somebody else that was also contributing to the rent there?

A Yes. Mr. Horton was.

MR. ABRAHAM: Pass the witness, Your Honor.

CROSS-EXAMINATION

BY MR. SMITH [Government Counsel]:

Q Mr. Harley, you and Mr. Horton rented locker 143 together, is that correct?

A Yes, sir.

Q And Mr. Horton was the one that signed off on the lease agreement?

A Yes, sir.

Q You and he shared the rental obligations?

A Yes.

Q Was it always you or always he that took the money over and made the payments?

A It was always him.

Q Was there ever an occasion where somebody other than one or the other of you did it, to your knowledge?

A Not to my knowledge.

Q You have told us that you likewise were at least interested in locker number 15, I think, Mr. Baylor, isn't that where the second locker was?

A Yes, sir.

[303] Q Were you present when the lease arrangements for locker number 15 were made, sir?

A No, I wasn't.

Q How do you know then, sir, who it was that signed up to be the lessee of that locker?

A Just by my association with Mr. Horton.

Q Mr. Horton told you that, is that correct?

A Right.

Q Did you ever hear that a man named Peter Anlian, A-n-l-i-a-n, was the record lessee of locker number 15?

A No.

Q Do you know Mr. Anlian?

A No, sir.

Q Do you know anyone named Anlian?

A Yes, but not a Peter.

Q Dolly?

A Yes, sir.

Q And she is Mr. Horton's girl friend?

A Yes, sir.

MR. SMITH: Thank you. No other questions, Your Honor.

THE COURT: Anything further?

MR. ABRAHAM: Your Honor, I want to clear up two items.

* * * *

[DIRECT EXAMINATION OF RESPONDENT STEELE]:

[305] Q Where did you live in February of 1981?

A Taos.

Q Is that the Meadow Inn referred to as a Meadow Inn?

A Yes, sir.

Q In February of 1981, how long had you lived there?

A Since approximately November 1st.

Q With Mr. Harley?

A Harley, yes.

Q Had you entered a lease on that house?

A Yes, sir.

Q Did you maintain personal belongings, private possessions, papers, this type of thing, at that house?

A Yes, sir.

Q Did you customarily live and sleep and eat at that house?

A Yes, sir.

Q Were you—was that the situation as it existed on February 6th, 7th, 8th, 9th and 10th?

A Yes.

Q The period of time immediately preceding your arrest?

A That's correct.

Q Were you present at the house on February 10th when a warrant was executed?

A Yes.

Q Were you arrested at that time?

A Yes, sir.

[306] Q Did you have an expectation of privacy regarding the contents of that house that you maintained as your residence?

A Yes, I did.

MR. BEAM: No further questions.

MR. SMITH: I have no questions of Mr. Steele, Your Honor.

THE COURT: You may step down.

(Witness excused.)

MR. BOYD: I will call Carl Muehlenweg very briefly, Your Honor. I will limit it to matters—

THE COURT: That's all right if you have got anything new, but if there is something that's been established and there is no controversy about it, just let it go.

CARL MUEHLENWEG,

was called as a witness herein by the Defendant Karo, and after having been duly sworn, testified upon his oath as follows, to-wit:

BY MR. BOYD:

Q Would you please state your name and address, please?

A Carl Muehlenweg, 1423 Fruit, Northwest.

Q Mr. Muehlenweg, I will try to be brief. During the year 1980, starting from sometime during April, and [307] proceeding through the end of that year, you had an understanding with the agents of the Drug Enforcement Administration with respect to your participating in a couple of investigations with them, did you not?

A Yes, I did.

Q And the first such investigation involved a Mr. Logan, is that correct.

A Correct.

Q Now, Mr. Logan was the object to turn—Mr. Logan had been the object of a search warrant prior to a warrant being executed on you, is that correct?

A That's correct.

Q And he had had laboratory equipment with your name or your company's name on it seized from him?

A That's correct.

Q And the D.E.A. told you, did they not, that that's how they found out about you?

A Yes.

THE COURT: I had better, just for the record, Mr. Walker, you are Mr. Muehlenweg's attorney and—

MR. WALKER: Yes, Your Honor.

THE COURT: And if you want to consult with Mr. Walker at any time about any question, the answer to which you feel might incriminate you, please do so. And if you want to anytime decline to answer on the [308] grounds of your Fifth Amendment privilege, you may do so.

THE WITNESS: Yes, sir.

THE COURT: Any answers you give might, of course, be used in prosecution against you if they did incriminate you.

THE WITNESS: Yes, sir.

THE COURT: So if you want to be up here with your client, Mr. Walker, that's all right. If you want to stay where you are—

MR. WALKER: I think we have tried to talk out any potential problems in that regard.

THE COURT: If you have got any problems, just stand up, or if you have any questions, consult your attorney, Mr. Muehlenweg.

THE WITNESS: Yes, sir.

Q (By Mr. Boyd) Mr. Muehlenweg, with respect to the Logan investigation, isn't it correct to say that what you did for the D.E.A. in that case was to inform the D.E.A. that Mr. Logan had ordered laboratory—certain laboratory equipment and chemicals from you, and that you would inform them when the chemicals came in and tell them when they were delivered to Mr. Logan? Is that correct?

A That's correct.

[309] Q And pursuant to that understanding, you did so inform them—

A Yes, I did.

Q —when those chemicals came in? None of those chemicals were controlled substances in and of themselves, were they?

A I don't believe so.

Q They weren't drugs?

A No, they weren't drugs. They were chemicals.

Q And laboratory equipment?

A Yes.

Q Now, you did, in fact, inform the D.E.A. of his order and the fact that he picked them up, and subsequent to that, isn't it correct that you were informed by the D.E.A. that they had executed a warrant, a search warrant or arrest warrant on Mr. Logan, following your delivery to him of those chemicals and that equipment?

A That's essentially what happened. Not necessarily in that order.

Q The result of the Logan investigation, to your knowledge, from the D.E.A., was that they executed—they confronted Mr. Logan and that he fled and killed himself in an automobile, isn't that correct?

A My understanding was that he followed—the D.E.A. followed Mr. Logan from my premises after obtaining [310] certain chemicals and laboratory equipment, and then after following him around for a period of time, did try to execute arrest on him. At which time, he did kill himself.

Q Now, and what they were able to seize pursuant to that effort on their part, from his vehicle, was laboratory equipment and chemicals?

A Yes.

Q They never informed you that they had seized any controlled substances from him then or later, or from any premises owned by him?

A Not from him directly, no.

Q Now, that was the sum total of information or assistance that you had supplied the D.E.A. before you informed them of the 50 gallons of ether which is at issue in this case, isn't that correct?

A At some time during the Logan investigation, I informed them that I had, in fact, previously had delivered to some other people some chemicals, namely, ether.

Q And that was the people involved in this investigation, is that correct?

A That's correct.

Q Who did you name as being involved in this investigation?

A James Karo.

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[314] [DIRECT EXAMINATION OF DEFENDANT RHODES]:

BY MR. BARGAS:

Q Would you state your name for the record, please?
A Gene Rhodes.
Q What is your present address, Mr. Rhodes?
A 617 Madison, Northeast.
Q And were you living at that address on February the 6th of this year?
A Yes, I was.
Q On that same date, did you have the opportunity to open up a locker that has been described as locker number 15 at a U-Store-It unit?
A Yes, I did.
Q Was that storage unit locked when you first approached it?
A Yes, it was with a Master padlock.
Q And did you have a key to that padlock?
A Yes, I did.
Q And did you open it?
A Yes.
Q And did you enter it?
A Yes.
Q Where did you obtain that key?
A From Richard Horton.

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[319] THE COURT: You have given him your advice. If you are asking me for a rule, you will get none one way or the other. You are Mr. Karo's attorney, and you give him your advice.

MR. TWOHIG: Your Honor, the thing is, the other Defendants have a right to establish as much as possible, the basis for a Severence Motion here, and this testimony is relevant to it. It is my understanding that the testimony—

THE COURT: You can seek to put on Mr. Karo. But Mr. Boyd's client, I assume he will abide by Mr. Boyd's advice.

MR. BOYD: Well, Your Honor, may I have a brief recess, then, with my client?

THE COURT: Yes. Is there anything else besides that?

MR. TWOHIG: No, other than Mr. Karo and the severance question, Your Honor, we have no other testimony at this time.

May I address the Court with respect to one issue [320] that relates to testimony, and make clear our position? Mr. Marchiondo spoke to Your Honor earlier with respect to a meeting we had with Judge Mechem, and the Court indicated it would be inappropriate to call Judge Mechem as a witness. We concur that it might seem inappropriate, we would make as an offer of proof what Judge Mechem would testify to for the record is what Mr. Marchiondo represented, and we would ask leave to call Judge Mechem.

THE COURT: Are you serious you want to issue a subpoena and call Judge Mechem?

MR. TWOHIG: Your Honor, I would not feel a subpoena would be necessary for Judge Mechem to testify here. I'm sure he would do so voluntarily if we requested it. I feel this way, that we are in a position where the government has, through their witnesses, through witnesses we have put on as adverse witnesses under cross-examination, given a version of events which occurred before Judge Mechem, and they are asking this Court to conclude that Judge Mechem relied upon things that he did not rely upon.

Now, either that testimony should be considered solely for the purpose of showing some kind of an intent, and the ruling of the Court should be that we don't call Judge Mechem, that we don't make an offer of proof, [321] that we don't present his testimony in any way, and that none of that information will even be considered in ruling upon

this motion and this suppression hearing, or we should be permitted to call Judge Mechem.

THE COURT: Well—

MR. TWOHIG: That's the difficulty with the procedure they have used. They have put this Court in that position. We haven't.

THE COURT: Yes, I know where the Court is. I understand fully. You don't need to help me out on that, Mr. Twohig. One place I'm not, is in a position of passing on the credibility of a colleague. That is not going to happen. So—

MR. TWOHIG: Very well, Your Honor.

MR. BOYD: Your Honor, I would also like to state for the record that I believe my client would have relevant testimony to give on the issue of severance, but under the circumstances, I guess I'm going to instruct him to take the Fifth, and I will not allow Mr. Twohig to call him.

THE COURT: Mr. Smith, are you going to have any evidence? That's all the evidence for the Movants on this matter.

MR. SMITH: No, Your Honor.

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[331] THE COURT: Thank you very much, counsel. We do have a very unfortunate situation, not the least of which is that the confidence of the Court and the affidavits that might be presented to it, I would say, is shaken, at a minimum. I will just—the Motion to Suppress will be granted and I will give you my reasons why.

Well, a chance to make some law in the Tenth Circuit on various points here, if you want. First of all, as to whether a warrant is needed for a beeper under these circumstances, there is, of course, a split in the circuits on that issue. It has been my feeling straight along, that a beeper is an intrusion; it's a search. It should require a warrant. Government agencies should not be free to just implant them at will. It should come through the normal Fourth-Amendment warrant probable-cause proc-

ess. And I would say very particularly, so I realize that one circuit, I think the Ninth or somebody—I think the Ninth, saying that it is not an intrusion because it does no more than track something that you could track with the eye, where you plant a beeper in a vehicle or something like that, that it could be followed. Well, five months—you can't—it's not possible to follow around for five months. That's what happened here as a result of having that beeper in there for five months. All told, I think a [332] warrant for a beeper, under these circumstances, was required.

As far as the affidavit, I will say possibly there are not too many outright blatant falsehoods, but as a result of half-truths, innuendos, deliberate attempt to create an impression other than the actual fact, my view is that the original affidavit, as putting it bluntly, is as phony as a three-dollar bill. And then you have not only that, that it was deliberately conceived to give a false impression, and I might add, a good job was done in that regard. Reading of that affidavit, you come out with a far different impression of the facts than the actual truth.

Now, as to—I don't know that it would make any difference whether or not the affiant or the U.S. Attorney supplied additional information to a Magistrate issuing the affidavit or issuing the warrant, that is a Judge in this case, but under any circumstances, you have a flat conflict in the evidence between the D.E.A. agent and the U.S. Attorney, as to whether or not the Judge was told anything outside of the affidavit. Since the government created that situation, that conflict, it's easy to resolve, it goes against the government. I find that the Judge was not told anything outside of the affidavit, if that is material.

[333] Now, I think the law is clear as far as the probable cause, you can't go outside of the affidavit, the sworn testimony. Just as far as what's right and what's wrong, it presents a terrible situation the government has done and created here.

Now, as far as standing, in my view, the installation of a beeper is a continuing search. It's not just a search when it's put on the can on the loading dock, or wherever, it's a search wherever that can is tracing. And that's the purpose of the whole thing, is to—and as is evident in this case, it did a good job. I say, accordingly, I think each person has standing, has demonstrated standing to challenge, except maybe the Defendant Roth is the only one I have a question about in that regard. Everyone else has demonstrated some connection with, or expectation of privacy where the can was intruded. Some have demonstrated ownership or possession of it. But rather than further complicate the situation, I will just grant the motion to suppress as to all the Defendants.

Now, as to the fact that there might have been additional probable cause developed and shown as the matter went along, that might be so. But I don't think you can cure the ill if it hadn't been for the faulty [334] beginning, it would have lost track of the whole thing right at the start, and the fact that they subsequenly developed probable cause, I think, is just a product of the initial improper affidavit and deception of the Court.

Now, in granting the Motion to Suppress, let me—I will just add another thing. I take no—I think there is a great deal to be said for the Chief Justice's view that suppression is not necessarily the answer where the law officials do something improper. The Chief Justice's view that perhaps other solutions such as lawsuits, disciplinary action or other matters are more appropriate where perfectly reliable evidence is developed and then has to be suppressed because of something that has been done wrong, either deliberately or inadvertently by the law officials. Unfortunately, this was done wrong, deliberately. Whether they though they were doing wrong or not, they were. Perhaps one of these days the Chief Justice's view will prevail and will not be necessary to suppress reliable evidence because of the errors in mal-

feasance of the law enforcement officials. Those will be my findings and conclusions. And the order of the Court, the evidence seized at the—all of the evidence seized at the search of the house in Taos, will be suppressed. * * *

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SUPREME COURT OF THE UNITED STATES

No. 83-850

UNITED STATES, PETITIONER

v.

JAMES CONNORS KARO, ET AL.

ORDER ALLOWING CERTIORARI

Filed January 16, 1984.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Tenth Circuit* is granted.

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